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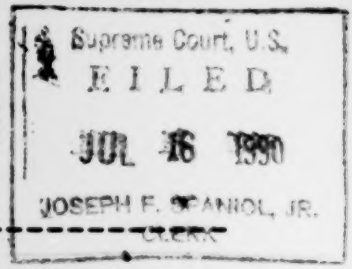

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. DUNKEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. In a criminal tax case, must a defendant's understanding of the tax law be "objectively reasonable?" [The 7th Circuit says "yes," while the 2nd, 7th, 5th, 6th and 9th Circuits say "no;" this Court has granted certiorari on the identical issue in U.S. v. Cheek, 882 F.2d 1263 (7th Cir. 1989) cert granted 110 S.Ct. 1108 (1990).

2. In a criminal tax case, is the "ostrich instruction" inconsistent with the tax statutes which require knowledge and specific criminal intent, where the jury is instructed that it can infer knowledge from a combination of suspicion and indifference to the truth?

3. In a tax evasion case, is the indictment infirm on the basis of vagueness or duplicity where it fails to

distinguish between the two crimes of evasion of assessment and evasion of payment of the tax? [This Court and several circuits have repeatedly held that 26 U.S.C. Sec. 7201 encompasses two crimes.]

4. In a tax evasion case, where the Government is required to prove a tax deficiency stemming from an affirmative act, is it the obligation of the Government to prove the deficiency which results not from a failure to file (gross income), but from a specific affirmative act? [This Court has repeatedly held that the failure to file a return is not sufficient to support a charge of tax evasion because it does not constitute an affirmative act.]

5. In the wake of California v. Greenwood, 108 S.Ct. 1625 (1988), by which this Court held that a defendant does not have a reasonable expectation of

privacy in garbage left on the public sidewalk, does a defendant/business owner have such expectation in garbage left in a private dumpster, where the dumpster is on private property and within the curtilage of the business?

PARTIES

The parties to the proceedings below are Donald W. MacPherson; John G. McKenzie, Assistant U.S. Attorney, Rockford, Illinois; Lisa K. Osofsky and Howard M. Pearl, Assistant U.S. Attorneys, 219 S. Dearborn Street, Chicago, Illinois 60604.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	
OPINION OF THE COURT BELOW	2
JURISDICTIONAL STATMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT:	16
I. INTRODUCTION	16
II. REQUIRING A GOOD FAITH MISUNDERSTANDING OF THE LAW TO BE OBJECTIVELY REASONABLE TO NEGATE WILLFULNESS IN A TAX PROSECUTION CONFLICTS WITH THE DECISION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS	19
A. The Seventh Circuit Requires That a Defendant's Belief Must be Objectively Reasonable to Qualify for a Mistaken View of Law.	19
B. The Requirement That a Mistake of Law Must be Objectively Reasonable to Negate Willfulness Conflicts With Decisions of This Court.	20

Page

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, Which Conflict This Court Should Resolve. 24

III. DECISIONS OF THIS COURT PROHIBIT A JURY FROM INFERRING WILLFULNESS FROM A COMBINATION OF SUSPICION AND INDIFFERENCE TO THE TRUTH IN A CRIMINAL PROSECUTION. 28

IV. THE SEVENTH CIRCUIT'S DECISION THAT SEC. 7201 CREATES ONLY ONE CRIME - TAX EVASION - CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS 29

A. The Seventh Circuit Found That Sec. 7201 Creates Only One Crime: Tax Evasion 30

B. The Seventh Circuit's Decision That Sec. 7201 Creates Only One Crime Conflicts With the Decisions of this Court. 31

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, a Conflict Which This Court Should Resolve. 33

Page

D. Evasion of the Assessment of Taxes as Opposed to the Evasion of payment of Taxes Requires Different Proof of Affirmative Acts. 35

V. LACK OF SUFFICIENT EVIDENCE ON THE EVASION COUNTS I AND IV DENIED PETITIONER HIS FIFTH AND SIXTH AMENDMENT RIGHTS 39

A. Overview 39

B. Income Tax Evasion Requires an Affirmative Act 39

C. DUNKEL'S Theory 40

D. The Government's Lack of Proof 41

E. DUNKEL'S Motion to Strike 42

F. Confusion to the Jury and Prejudice to DUNKEL 43

VI. IN THE WAKE OF CALIFORNIA v. GREENWOOD, 108 S.CT. 1625 (1988) BY WHICH THIS COURT HELD THAT A DEFENDANT DOES NOT HAVE A REASONBLE EXPECTATION OF PRIVACY IN GARBAGE LEFT ON THE PUBLIC SIDEWALK, A DEFENDANT - BUSINESS OWNER - DOES HAVE SUCH EXPECTATION IN GARBAGE LEFT IN A PRIVATE DUMPSTER, WHERE THE DUMPSTER IS ON PRIVATE PROPERTY

Page

AND WITHIN THE CURTILAGE OF THE BUSINESS 43

A. The Seventh Circuit Decision 44

B. The Greenwood Case 44

VII. IMPLICATIONS AND CONCLUSION 50

APPENDIX filed separately

TABLE OF CITATIONS

CASES	Page
Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949)	26
Bollenbach v. United States, 326 U.S. 607	38
California v. Greenwood, 108 S.Ct. 1625 (1988)	43,44 46,47, 50
Cohan v. United States, 297 F.2d 760, 770 (9th Cir. 1962)	34,37
Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974)	26
Florida v. Riley, 109 S.Ct. 693 (1989)	48,49
Long v. United States, 355 U.S. 339 (1958)	31,33 36
Mann v. United States, 319 F.2d 404, 409-410 (5th Cir. 1963)	25
Oliver v. United States, 104 S.Ct. 1735 (1984)	48

	Page
Sansone v. United States, 380 U.S. 343 (1965)	22,23, 30,31, 32,33, 34,40, 42
United States v. Aitken, 755 F.2d 188 (1st Cir. 1985)	24
United States v. Ashfield, 735 F.2d 101, 105 (3rd Cir. (1984)	24
United States v. Bahalik, 606 F.2d 99 (5th Cir. 1979)	47,48, 50
United States v. Bishop, 412 U.S. 346 (1973)	22,28
United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987)	20
United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984)	25
United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989)	19
United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984)	31,33 34,
United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990)	in passim

	Page
United States v. England, 347 F.2d 425 (7th Cir. 1965)	34
United States v. Flintcraft, 803 F.2d 184 (5th Cir. 1986)	25
United States v. Goetz, 746 F.2d 705 (11th Cir. 1984)	27
United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988)	33,36
United States v. Jerde, 841 F.2d 818, 822 (8th Cir. 1988)	26
United States v. Krager, 711 F.2d 6, 7 (2nd Cir. 1983)	24
United States v. Masat, 896 F.2d 88 (5th Cir. 1990)	34
United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984)	44,46
United States v. Mollet, 290 F.2d 273, 274 (2nd Cir. 1961)	33,37
United States v. Murdock, 290 U.S. 389 (1933)	20,21, 22,23, 29
United States v. Paine, 800 F.2d 227, 229 (10th Cir. 1986)	27

	Page
United States v. Phillips, 775 F.2d 262, 263 (10th Cir. 1985)	26
United States v. Pomponio, 429 U.S. 10 (1976)	23,28, 29
United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976)	50
United States v. Schiff, 801 F.2d 108, 112 (2nd Cir. 1986)	27
United States v. Spies, 63 S.Ct. Rpt. 364 (1943)	40,42
United States v. Swart, 679 F.2d 698 (7th Cir. 1982)	50
United States v. Terry, 702 F.2d 299 (7th Cir. 1983)	47,48, 50
United States v. Voohies, 658 F.2d 710 (9th Cir. 1981)	34,36
Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956)	25

STATUTES

18 U.S.C. Sec. 3231	3

	Page
26 U.S.C. Sec. 7201	3,4, 18,29, 30,31, 32,33, 50,51
26 U.S.C. Sec. 7203	3
28 U.S.C. Sec. 1254(1)	2
Rule 13. Supreme Court Rules	2

U.S. CONSTITUTION

Fourth Amendment	2,48, 49,50
Fifth Amendment	3,21, 29,30, 39,51
Sixth Amendment	3,29, 30,39, 51,52

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES C. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The PETITIONER, JAMES C. DUNKEL (DUNKEL), by and through counsel DONALD W. MacPHERSON of the law firm MacPHERSON & McCARVILLE, P.A., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 16, 1990. (The mandate

was stayed by this Court on May 25, 1990; See APPENDIX E.)

OPINIONS BELOW

The opinion of the Appellate Judges is reprinted in APPENDIX A to this Petition and reported as United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals was filed on April 16, 1990. A timely filed petition for rehearing and suggestion for rehearing en banc was denied on May 11, 1990, Appendix B. The jurisdiction of this court rests upon 28 U.S.C. Sec. 1254(1). The Petition is timely filed pursuant to Rule 13 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Fourth Amendment, the due process clause of the

Fifth Amendment, and the Sixth Amendment to the United States Constitution, 26 U.S.C. Secs. 7201 and 7203, which collectively constitute APPENDIX C.

STATEMENT OF THE FACTS

DUNKEL was convicted in the United States District Court, Northern District of Illinois on a five-count indictment charging him with willfully and knowingly failing to make a federal income tax return for the calendar years 1981, 1982 and 1983, in violation of 26 U.S.C. Sec. 7203; and willfully attempting to evade and defeat the substantial federal income tax due and owing for the years 1981 and 1983, in violation of 26 U.S.C. Sec. 7201. The District Court had original jurisdiction under 18 U.S.C. Sec. 3231. APPENDIX C-11a.

Count I of the Indictment (attempted tax evasion) alleges that:

> ... James C. Dunkel ... did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America for the 1981 calendar year: [attempted evasion of assessment or of collection? two different crimes]
> (a) by failing to make said income tax return on or before April 15, 1982 to the Internal Revenue Service ... [a failure to act; not an affirmative act]
> (b) by using checks made payable to the Defendant in which constituted income, endorsing the checks and giving the checks to others in payment for expenses in order to conceal his income; [affirmative act]
> (c) by requesting and receiving rent payments in the form of silver dollars instead of Federal Reserve Notes, the silver dollars having a face value of approximately $297 [affirmative act];
> (d) by ceasing and failing to pay estimated tax payments; [a failure to act; not an affirmative act]; and
> (e) by depositing and cashing checks at out of state banks [affirmative act]; in violation of Title 26, United States Code, Sec. 7201. (Emphasis added)

In Count IV of the Indictment (attempted tax evasion), alleges that:

> ... JAMES C. DUNKEL, Defendant

> herein, did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America for the 1983 calendar year:
> (a) by failing to make said income tax return on or before April 15, 1984 to the Internal Revenue Service .... [failure to act; not an affirmative act];
> (b) by using checks made payable to the Defendant which constituted income, endorsing the checks and giving the checks to others in payment for expenses in order to conceal his income [affirmative act]; and
> (c) by failing to pay estimated tax [failure to act; not an affirmative act]; in violation of Title 26, United States Code, Sec. 7201.[1]

Taken as a whole, the Indictment could be read to mean that DUNKEL was charged with attempt to evade the payment of tax. On the other hand, given the fact that some of the affirmative acts could be read to express an attempt of

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1. References to the record (pg. B1) Indictment, taken from APPELLANT'S Appendix in the Court of Appeals.

concealing income, the Indictment could be read to mean that DUNKEL attempted to evade the assessment of tax. Perplexed by the charges, DUNKEL filed pretrial motions to dismiss the Indictment due to duplicity or vagueness, or in the alternative to require an election and also move for a bill of particulars. These motions were denied and the case proceeded to trial.

At his jury trial, PETITIONER presented evidence of his sincerely held views that he did not believe he had violated the law; i.e. that his conduct was not "willful". Further, PETITIONER presented evidence on Counts I and IV that the GOVERNMENT did not prove the amount of tax (the deficiency) DUNKEL attempted to evade by the "affirmative acts": depositing checks in an out-of-state bank for 1981, receiving

silver for 1981, or using third-party checks for 1981 and 1983.

It was and is DUNKEL'S position that because he had failed to file a timely return, and because he was charged with tax evasion which requires a tax deficiency stemming from an affirmative act, it was the obligation of the GOVERNMENT to prove a tax due and owing resulting from not the failure to file, but from the affirmative act. The GOVERNMENT failed in this obligation, as evidence by the following exchange (emphasis supplied);

By MR. MACPHERSON, (Defense Counsel):

Q. Sir [IRS Revenue Agent/Expert Witness], for the year 1983 and what's in evidence as to third-party checks [affirmative act] that the DEFENDANT endorsed over for expenses, have you made any calculation as to what tax would be due and owing for 1983 from that income reflected on those checks that were signed over for expenses ...

A. No, I did not.

Q. And as to 1981, same question. Did you make any independent calculation as to what tax would be due in owing just from income reflected on the third-party check? [affirmative act]

A. No, I did not....

Q. And for 1981, did you make any independent calculation as to what tax would be due and owing from any income that would be reflected on depositing in cash and checks at an out-of-state bank? [affirmative act]

A. No, I did not....

Q. Sir, considering that you've done it on all of the income, I take it then, you wouldn't be able to tell the jury what amount of tax the DEFENDANT attempted to evade by depositing the checks in an out-of-state bank for 1981, using third-party checks for 1981, or receiving silver for 1981? [affirmative act]

A. I wouldn't be able to tell you about the tax for any specific item, no.

Q. And that would be the same as to 1983?

A. That's correct.

(APPENDIX D-1 pgs. 28a-30a.)

Before closing arguments, the District Court held a jury instruction

conference. Over PETITIONER'S objection, the Court decided to give the GOVERNMENT'S instructions number 32, 37, and 75 as follows: (APPENDIX D pgs. 15a-21a; 25a-27a)) as follows:

> To sustain the charges of attempting to evade or defeat a tax as charged in Count I (tax year 1981) and Count IV (tax year 1983) of the indictment, the government must prove the following propositions:
>
> First, a substantial tax was due and owing by the Defendant;
>
> Second, the Defendant intended to evade or defeat the tax; and
>
> Third, the Defendant willfully did some act in furtherance of this intent .... (Emphasis added)
>
> The evidence need not prove each affirmative act alleged... However, to sustain the charge of willfully attempting to evade taxes the government must show more than a failing by the defendant to make an income tax return.... An affirmative act of the defendant is an act the likely of which would be to mislead or conceal....

(APPENDIX D-2, pg. 31a-32a.)

The GOVERNMENT'S counsel asserted that these instructions were accurate in that there was no need to distinguish between whether the PETITIONER intended to evade or defeat the assessment of tax or evade or defeat the payment of tax, because PETITIONER was charged with "evading the tax." (APPENDIX D pgs. 13a, 19a, 20a) Instruction 37 informed the jury that willfulness could be shown if there was a specific intent to evade or defeat a tax which was the PETITIONER'S legal duty to pay and which the PETITIONER knew it was his legal duty to pay. (APPENDIX D-2 pg. 32a)

> With respect to the charges of tax evasion contained in Count I (1981) and Count IV (1983), the term "willfully" means voluntary and intentionally with a specific intent to evade or defeat a tax which it was the legal duty of the Defendant to pay to the government and which the Defendant knew it was his legal duty to pay. (Emphasis added)

This was the law of a case which was argued by the parties and which was submitted to the jury over PETITIONER'S objections, even after it was agreed by the parties that there was no evidence to show any intent to evade or defeat the payment of any tax. (APPENDIX D pgs. 17a, 18a)

Two other instructions on willfulness were discussed. The first was a definition of "objectively reasonable good faith misunderstanding" which was originally tendered as Government Instruction 40 (APPENDIX D pg. 24a) after redrafting by the Court was given, over PETITIONER'S objection, as follows:

> A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, <u>the misunderstanding must be objectively reasonable</u>....
> (Emphasis added)

(APPENDIX D-2 pgs. 32a-33a) With this instruction the court also gave the following "Ostrich" instruction 39 (emphasis supplied):

> The word knowingly means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.
>
> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly as I have used the word.
>
> (APPENDIX D-2 pg. 32a)

PETITIONER'S objection to THIS instruction was also denied by the court. (APPENDIX D pg. 21a-23a)

Some of the evidence used to convict

DUNKEL came from his refuse, which an informant culled. During an evidentiary hearing, PETITIONER testified that he had purchased a dumpster for the purpose of disposing medical waste and other toxic matters. The dumpster was located in a private parking lot (dental and other offices), and within the curtilage of PETITIONER's office. (RT pg. 176)[2] Local ordinances required that arrangements be made with a private company to have collectors come in and pick up the trash. Local ordinances made it unlawful for PETITIONER to use anything other than the dumpster for collection of his garbage (Rockford Ordinance, Sections 13-25, 13-26, 13-29); and, also for persons to "move, remove or intefere with any waste

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2. All references are to the Transcript of Proceedings, Vol 2, Jan. 30, 1989/Motion to Suppress on file with the Court of Appeals.

matter receptacle or the contents thereof." (Sec. 13-23) (See APPENDIX F, pgs. 36a, 37a) (RT pg. 176-178)

The dumpster was located on commercial property owned by PETITIONER, upon which he had erected a six-foot fence between the building and the adjacent parking lot. (RT 179, 180) The property was also posted with "private property/no trespassing" signs. (RT 184, 185) DUNKEL also testified that he had no intention of abandoning the property that went into the dumpster, to wit:

> It's always been my feeling that that's a secured area because I will throw away cartridges of anesthetics and things that are out of date, medication that would fall into anybody's hands could be fatal.

(RT 186) Further testimony showed that it would be impossible for somebody on the north side of the property to reach over and attempt to get trash out of the

dumpster because the retaining wall is eleven feet, ten inches away from the dumpster. (RT 198, 199) The dumpster used on the premises was four feet by seven feet and also had a metal lid on it to keep the neighborhood children and animals out. (RT 178, 179)

The District Court found that (1) the dumpster was 170 feet away from the street and (2) on a private parking lot. (RT 299-309) However, because the dumpster was located on a parking lot where the public was invited, at least insofar as conducting business and the eight tenants located therein, the area was accessible to the general public. Thus, the District Court held PETITIONER had no reasonable expectation of privacy in his garbage. As to whether DUNKEL'S subjective expectation of privacy was objectively reasonable, the Court found

such an issue to be compounded because of DUNKEL'S profession and his need to have privacy in the trash deposited. Nevertheless, the District Court denied DUNKEL'S suppression motion. (RT 311, 312)

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

PETITIONER JAMES DUNKEL was convicted of specific intent crimes under jury instructions which required him to show that his beliefs about his legal duties were not only sincerely and honestly held, but also "objectively reasonable." The instruction also told the jury that they could infer knowledge from a combination of suspicion and indifference to the truth; i.e., that the nature of the PETITIONER'S conduct was not through ignorance, mistake or accident, but rather capricious or

careless.

The Seventh Circuit, in its unique "objectively reasonable" test, is in direct conflict with at least seven other circuits, all of which espouse a subjective standard which allows a jury to determine a defendant's good faith vel non based on what the defendant honestly believed, and not what a jury believes is reasonable. This Court's Rule 10 sets out as a reason for granting certiorari, a situation where a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Such is clearly the situation here. Rule 10 also asks whether a court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts

with the applicable decisions of this Court. Both criteria here apply.

The Seventh Circuit not only has departed from the prevailing law in the seven other federal circuits on the element of willfulness, but also has chosen to ignore the holdings of this Court and other federal circuits which have interpreted and applied Sec. 7201; i.e. Sec. 7201 creates two crimes: evasion of assessment and evasion of payment. Moreover, the District Court's instruction permits a jury to infer willfulness from a combination of suspicion and indifference to truth and is contrary to the decisions of this Court, thereby reducing willfulness in the context of a criminal tax case to a level of "gross negligence."

The Seventh Circuit's contrary approach here has broad implications for

the administration of the criminal tax laws. Only this Court can act to bring the Seventh Circuit into conformity with other circuits and with this Court's own decisions.

II. REQUIRING A GOOD FAITH MISUNDERSTANDING OF THE LAW TO BE OBJECTIVELY REASONABLE TO NEGATE WILLFULNESS IN A TAX PROSECUTION CONFLICTS WITH THE DECISION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

A. The Seventh Circuit Requires That a Defendant's Belief Must be objectively Reasonable to Qualify for a Mistaken View of Law.

The Seventh Circuit held that PETITIONER'S belief must be objectively reasonable in order to constitute a mistaken view of law and thereby negate willfulness:

> Although only willful evasion or failure to file is criminal in this circuit, a mistaken view of law does not negate willfulness if the defendant's legal belief is objectively unreasonable; e.g. United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989) cert granted

> 110 S.Ct. 1108 (1990). Like the Lord High Executioner in the Mikado, we've "got a little list" of beliefs that are objectively unreasonable such as the Sixteenth Amendment was not properly ratified and that wages are not income. See United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987). We add to that list the belief that payment of income taxes is "voluntary." Juries should not be invited to decide for themselves whether it is "reasonable" to believe that the income tax law is voluntary ... A goodly part of the business of district courts is creating object lessons of that fact. Dr. Dunkel has become another.

B. The Requirement That a Mistake of Law Must be objectively Reasonable to Negate Willfulness Conflicts With Decisions of This Court.

This Court has consistently held that criminal tax offenses are specific intent crimes, and a defendant who merey fails to measure up to some prescribed standard of conduct is not a criminal.

In United States v. Murdock, 290 U.S. 389 (1933), defendant asserted his

Fifth Amendment privilege against self incrimination in response to questions put to him by a revenue agent of the Internal Revenue Service. Thereafter, he was charged with willful failure to provide information. The trial court refused to instruct the jury that the defendant's good faith belief in the propriety of his Fifth Amendment assertion would constitute a defense to the crime charged. This Court in Murdock held:

> Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. (Emphasis added)

Murdock was entitled to the instruction he had requested, even though his refusal to answer questions put to

him by the revenue agent was intentional and without legal justification. Id. at 396-397.

Likewise, Sansone v. United States, 380 U.S. 343 (1965), held that the defendant's conduct was willful only if "he knew he should have reported more income than he did." Id. at 353. Defendant was under the mistaken belief that because repairs needed to be done on land which was sold, such repairs eliminated any gain, and therefore, he had no income. Neither Murdock nor Sansone suggest that a defendant's belief must be "objectively reasonable."

In United States v. Bishop, 412 U.S. 346 (1973), this court disagreed that willfulness would suffice for a conviction of a tax related offense upon a showing of "unreasonable, capricious or careless disregard for the truth." The

court noted that: "In our complex tax system, uncertainty often arises, even among taxpayers who earnestly wish to follow the law." Id. at 360. This Court reaffirmed what is said in Sansone and Murdock:

> The court in fact has recognized that the word willfully in these statutes generally connotates [sic] a voluntary intentional violation of a known legal duty. It has formulated the requirement of willfulness as bad faith or evil intent... or evil motive and one of justification in view of all the financial circumstances of the taxpayer.

Id. at 360.

In United States v. Pomponio, 429 U.S. 10 (1976), in a per curiam opinion, this court again noted that willfulness in the tax context requires more than a careless disregard for the truth. Id. at 12. The Pomponio court concluded that, "evil motive" means specific intent to violate the law. As to the meaning of

willfulness, the court stated: "A voluntary, intentional violation of a known legal duty." Id. at 12.

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, Which Conflict This Court Should Resolve.

Alone among the circuits is the Seventh Circuit which, unlike any other circuit, requires a mistake of law to be objectively reasonable to negate willfulness. All other circuits have rejected such a rule without any difficulty, even as to "tax protesters." United States v. Aitken, 755 F.2d 188 (1st Cir. 1985) (mistake of law need not be objectively reasonable, the key is whether the defendant honestly held a mistaken belief as to what the law requires); United States v. Krager, 711 F.2d 6, 7 (2nd Cir. 1983); United States v. Ashfield, 735 F.2d 101, 105 (3rd Cir.

1984) cert denied 469 U.S. 858 (1984); Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956) cert denied 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime except that where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness and failure to perform the duty"); Mann v. United States, 319 F.2d 404, 409-410 (5th Cir. 1963) cert denied 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person ... would reasonably have expected to be the consequences of his conduct"); United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984) (a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); United States v. Flintcraft, 803 F.2d 184 (5th Cir. 1986) after remand

863 F.2d 342 (5th Cir. 1988) (plain error to give an "objectively reasonable" instruction in a tax protester case); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949); United States v. Jerde, 841 F.2d 818, 822 (8th Cir. 1988) ("we agree that a subjective rather than an objective standard is to be applied in evaluating a good faith defense [to tax charges]"); (Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974) cert denied 419 U.S. 1123 (1975) (if a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a return"); United States v. Phillips, 775 F.2d 262, 263 (10th Cir. 1985) ("we find that a subjective standard is appropriately applied in assessing a defendant's claimed belief

that the law did not require that he file a return"); United States v. Paine, 800 F.2d 227, 229 (10th Cir. 1986) (the jury was told "... even if a defendant's claim of good faith misunderstanding is unreasonable, the jury may nonetheless still find that the defendant acted in good faith and did not willfully intend to violate the law"); United States v. Goetz, 746 F.2d 705 (11th Cir. 1984) (it is the providence of the jury, not the court, to decide defendant's good faith). But see United States v. Schiff, 801 F.2d 108, 112 (2nd Cir. 1986) cert denied 480 U.S. 947 (1987) (dictum: an objectively reasonable instruction "would not have been error")

This Court should grant the Petition and resolve the conflict which now exists between the Seventh Circuit and the several circuit courts and the

disagreement and departure from this Court's decisions.

III. DECISIONS OF THIS COURT PROHIBIT A JURY FROM INFERRING WILLFULNESS FROM A COMBINATION OF SUSPICION AND INDIFFERENCE TO THE TRUTH IN A CRIMINAL TAX PROSECUTION - THE "OSTRICH INSTRUCTION".

As expressly noted by this Court in Pomponio, willfulness in the tax context requires more than a careless disregard for the truth. Id. at 12. As in Pomponio, in Bishop, supra, this court rejected any notion that willfulness could be shown by an "unreasonable, capricious, or careless disregard for the truth." The court rejected the Ninth Circuit's formulation of a lesser willfulness threshold, stating: "degrees of negligence give rise in the tax system to civil penalties." Id. at 361. An instruction which allows a jury to infer knowledge from a combination of suspicion

and indifference to truth reduces willfulness in the context of a criminal tax case to a level of "gross negligence."

Under Murdock and Pomponio, a defendant who has a bona fide misunderstanding of his duty to file does not "know" of his legal duty, because of his misunderstanding and lacks willfulness. A "conscious avoidance" or "Ostrich" instruction reduces willfulness in the context of a criminal tax case to a level involving a "careless disregard or reckless indifference to the truth," contrary to Bishop and Pomponio.

This Court should grant the Petition to determine whether the instruction is consistent with the statutes under which the PETITIONER was convicted and his Fifth and Sixth Amendment rights.

IV. THE SEVENTH CIRCUIT'S DECISION THAT SEC. 7201 CREATES ONLY ONE CRIME -

TAX EVASION - CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS

A. The Seventh Circuit Found That Sec. 7201 Creates Only One Crime: Tax Evasion

On appeal, DUNKEL argued that each count of the Indictment under Sec. 7201 is vague or alternatively duplicitous because it is not clear whether both the evasion of assessment of taxes and the evasion of payment of taxes were charged in each count. Thus, the Indictment violated his due process right within the Fifth Amendment and also his Sixth Amendment right in that a general verdict of guilty would not reveal whether the jury found him guilty of one crime and not guilty of the other or guilty at all. The Seventh Circuit, however, found that Sec. 7201 creates only one crime: tax evasion. In doing so, it rejected this court's decision in Sansone stating:

> Sometimes it is convenient to say that different methods are different (crimes) as the Supreme Court once said about Sec. 7201. Sansone v. United States, 380 U.S. 343, 354 (1965); See also United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984)...
>
> We need not decide whether Congress has authorized this. It is enough to say that nothing in the text or history of Sec. 7201 requires an indictment to treat Sec. 7201 as if it were two sections of the United States Code. APPENDIX "A" p. 4a, 5a.

B. The Seventh Circuit's Decision That Sec. 7201 Creates Only One Crime Conflicts With the Decisions of this Court.

The Seventh Circuit's decision that Sec. 7201 creates only one crime is totally inconsistent from this Court's decisions that Sec. 7201 charges not one, but two crimes.

In Long v. United States, 355 U.S. 339 (1958), defendants were charged in a multi-count indictment charging inter alia attempted evasion of assessment of

income taxes by filing a fraudulent return (Count VI) and with attempted evasion of payment of income taxes by converting and diverting assets (Count IX). Id. at 360, 361. This Court specifically found that the means of evading assessment of tax were different than the means of evading payment of tax. Id. at 343.

In Sansone v. United States, 380 U.S. 343 (1965), defendant was charged with attempting to evade taxes by defeating the assessment of taxes for the tax year 1957. Id. at 354. This Court again specifically recognized that Sec. 7201 includes separate and distinct offenses of willfully attempting to evade or defeat the assessment of a tax and willfully attempting to evade or defeat the payment of tax:

> As this Court has recognized, Sec. 7201 includes the offense of

> willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of tax (Emphasis added).

Id. at 354, citing L , supra.

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, a Conflict Which This Court Should Resolve.

The Panel's opinion conflicts with the First, Second, Seventh and Ninth Circuits which have expressly held that Sec. 7201 creates the two offenses, evading and defeating the assessment of tax and evading and defeating its payment. United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) (the court relied on Sansone and Dack and found that Sec. 7201 defines two separate and distinct crimes); United States v. Mollet, 290 F.2d 273, 274 (2nd Cir. 1961) (7201 prohibits both a willful attempt to evade any tax and a willful attempt to

evade the payment thereof). Cohan v. United States, 297 F.2d 760, 770 (9th Cir. 1962) (the two offenses are not the same); United States v. Voorhies, 658 F.2d 710 (9th Cir. 1981) (two crimes).

Aside from conflicting with other circuits, the Dunkel opinion conflicts with prior Seventh Circuit opinions. United States v. England, 347 F.2d 425 (7th Cir. 1965); United States v. Dack, supra (willful attempt to evade or defeat a tax includes government's efforts to ascertain a citizen's tax liability as opposed to willful attempt to evade or defeat payment of tax, citing Sansone and Voorhies).

The Fifth Circuit, however, has agreed with the Seventh Circuit opinion that there is one crime, the evasion of taxes. United States v. Masat, 896 F.2d 88, 91 (5th Cir. 1990) (under plain error

standard).

This Court should grant the Petition and resolve the conflict among the circuit courts regarding this important issue of law, an issue which will continue to arise.

D. Evasion of the Assessment of Taxes as Opposed to the Evasion of payment of Taxes Requires Different Proof of Affirmative Acts.

The Seventh Circuit's opinion recognized that PETITIONER'S Indictment listed six specific ways in which he evaded taxes (five in 1981 and three in 1982, with two methods used in each year), thereby drawing the conclusion that DUNKEL "knew exactly what he had to prepare to defend against, and the jury knew its role as well." APPENDIX "A", p. 5a.

Without any definitive identification of evidence to show which

of the affirmative acts supported the offense of evasion of assessment of taxes or evasion of payment of taxes for either year, 1981 or 1983, the Dunkel opinion overlooks the fact that the behavior indicative of an attempt to evade the payment of a tax does not necessarily meet the same standard as an attempt to evade the assessment of tax. This Court in Long, supra, noted that the means of evading assessment of tax were different than the means of evading payment of tax. Id. at 343. See also United States v. Voorheis, supra (evidence was sufficient to support the willfulness requirement for evasion of payment of taxes; Voorhies had engaged in affirmative acts indicative of an attempt to evade the payment of taxes); United States v. Hogan, supra (the affirmative act of filing a W-4 resulting in the under

withholding of tax indicative of an attempt to evade the payment of tax); United States v. Mollet, supra (the evidence adduced by the government goes beyond a mere failure by the defendant to reveal the existence of assets and is sufficient to satisfy the requisite affirmative conduct upon which the prosecution relies to show evasion of payment); Cohan v. United States, supra (affirmative act to evade or defeat the assessment of tax are distinct from the acts used to evade the payment of tax).

It is a fundamental precept of the administration of justice in the federal courts that the PETITIONER must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the

PETITIONER be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous view of law to suggest that the evidence is sufficient to support a unanimous verdict on both crimes, and that the verdict was reached in accordance with the proper standard of law. As this Court stated in a case in response to such a contention:

> It may not be amiss to remind that the question is not whether guilt be spelled out of a record but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts.

Bollenback v. United States, 326 U.S. 607, 614-615. PETITIONER is entitled to be tried under proper legal criteria and conviction should not be erroneously secured on one theory, on the speculation that conviction would have followed if

the correct theory had been applied. Such an application of the statute seriously undermines DUNKEL'S Fifth and Sixth Amendment rights.

V. LACK OF SUFFICIENT EVIDENCE ON THE EVASION COUNTS I AND IV DENIED PETITIONER HIS FIFTH AND SIXTH AMENDMENT RIGHTS

A. Overview

DUNKEL presents an issue never addressed in any reported tax case: whether the government can sustain a conviction for attempted income tax evasion where the government has not calculated the tax due and owing resulting from the affirmative act or acts constituting in the attempt; rather the government has calculated a tax resulting from a combination of DUNKEL'S failures to act, together with his affirmative acts.

B. Income Tax Evasion Requires An Affirmative Act

Long ago, put to rest a notion that a defendant could be charged with willful attempt of tax evasion by his mere failure to act. U.S. vs. Spies, 63 S.Ct. 364 (1943). In Sansone vs. U.S., 85 S.Ct. 1004 (1965), this court characterized the Spies decision as requiring in the felony tax evasion case "some willful commission in addition to the willful omissions that make up the list of misdemeanors."

C. DUNKEL'S Theory

Given the Spies holding as endorsed by Sansone, DUNKEL takes the issue one step further to causation. If failure to file a return or failure to pay the tax (or failure to keep adequate records) is not sufficient as an affirmative act which would constitute an attempt, then any tax evaded or avoided as a result of said failures would not be tax which

DUNKEL "attempted to evade." No affirmative act, no attempt; no attempt, no "attempted tax evasion."

D. The Government's Lack Of Proof

Internal Revenue Service AGENT KELLEY KILCOIN was called to the stand to calculate the tax liability of DUNKEL for the years in question. KILCOIN was called back to the stand by the defense and asked whether he made any tax liability calculation as to the income directly attributable to the attempts to evade alleged in the indictment. He answered that he did not make any such calculation. KILCOIN also testified that he would not be able to tell the jury what amount of tax the DUNKEL attempted to evade in 1981 by DUNKEL depositing checks in an out of state bank using third party checks and receiving silver. KILCOIN also said that his answer would

be the same as to 1983.

In the government's case in chief KILCOIN had testified that DUNKEL had, for example, a tax liability of some $41,000.00 for 1981, which tax calculation was based upon all unreported income; i.e.. income reported as a result of DUNKEL'S failure to file (lack of attempt) and DUNKEL'S alleged affirmative acts in his attempt to evade the tax: third party checks, silver coins and an out of town bank account. (The amount for 1983 was about $14,000.00 due.)

E. DUNKEL'S Motion to Strike

Relying upon Spies and Sansone, DUNKEL in a pretrial motion moved to strike from the indictment DUNKEL'S failure to file a return and failure to pay estimated tax payments which were listed under the heading of "Attempt to Evade and Defeat the Substantial Income

Tax Due and Owing." The motion was denied. DUNKEL renewed his motion during the instruction conference. APPENDIX D, 26A.

F. Confusion to the Jury and Prejudice to DUNKEL.

The confusion of the jury and prejudice to PETITIONER should be obvious: the higher the amount of tax DUNKEL attempted to evade, the more culpable PETITIONER may appear. If, the deficiency as a matter of law is to be computed from the "affirmative acts," as PETITIONER argues it should, PETITIONER has not been tried under the proper legal criteria and his conviction has been erroneously secured. Accordingly, the writ should issue.

VI. IN THE WAKE OF CALIFORNIA V. GREENWOOD, 108 S.CT. 1625 (1988) BY WHICH THIS COURT HELD THAT A DEFENDANT DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN GARBAGE LEFT ON THE PUBLIC SIDEWALK, A DEFENDANT - BUSINESS OWNER - DOES

HAVE SUCH EXPECTATION IN GARBAGE LEFT IN A PRIVATE DUMPSTER, WHERE THE DUMPSTER IS ON PRIVATE PROPERTY AND WITHIN THE CURTILAGE OF THE BUSINESS.

A. The Seventh Circuit Decision

In affirming the District Court's decision that DUNKEL had no reasonable expectation of privacy, "curtilage" did not alter the fact; "... the parking lot was open to all comers... not only DUNKEL'S invitees, but also those of his seven tenants." APPENDIX A, pg. 3a. The Court found the dumpster to be accessible to the public "as much as if it were sitting in any other open lot." APPENDIX A, pg. 4a. The panel relied on the case United States v. Michaels, 726 F.2d 1307, 1312-13 (8th Cir. 1984), cited in Greenwood, 46 U.S. at 42.

B. The Greenwood Case

The cases cited in California v. Greenwood are distinguishable from the

instant case in that the garbage seized in all those cases was no longer on private property and was outside the curtilage. Therefore, in those cases, there as no reasonable expectation of privacy. Unlike the case of Greenwood and the cases cited therein, the facts in the instant case do not support the Government's claim that PETITIONER extended an implicit invitation to individuals to enter during the non-business hours or when there were no employees on the premises. Further, there is no reasonable basis to believe that the dumpster was generally open to the public, i.e., in a manner of speaking for the express purpose of having strangers take it.

First, the dumpster was well within the curtilage of the business and not for public consumption or use. Second, signs

were posted which informed people that the property was private and there was no trespassing. Third, the dumpster was placed specifically on the property by the doctor because of the medical waste and toxic matters which had to be disposed of. Also, the property had been partially fenced in and a retaining wall built by the doctor to keep out uninvited individuals.

Relying on United States v. Michaels, cited by this Court in Greenwood, is distinguishable. Michaels involved a trash bin accessible to all apartment tenants, invited and uninvited visitors, unfenced and unrestricted in its use. In the instant case, the evidence indicates an intent by DUNKEL to retain some control over or interest in the discarded trash; i.e. medical waste. In addition, local ordinances required

PETITIONER to use a dumpster for collection of his garbage, required a private collection to pick up the dumpster and collect the contents thereof, and also made it a crime for any person to remove or interfere with the receptacle or contents thereof. See United States v. Terry, 702 F.2d 299 (7th Cir. 1983) (restrictions on containers or retention of containers on private property until collected, indicate an intent to retain a private interest in the trash discarded); and United States v. Bahalik, 606 F.2d 99 (5th Cir. 1979) (reliance on local ordinances would indicate an expectation of privacy) also cited in Greenwood.

DUNKEL'S subjective belief that he had an expectation of privacy in the refuse discarded would not be unreasonable in light of his intent to

retain a privacy interest in the trash discarded. The panel's finding that the "dumpster was accessible to the public as much as if it were sitting in any other open lot," overlooks the cases of Terry and Bahalik, supra, and DUNKEL'S subjective intent to retain control over the trash. The panel's decision also overlooks this Court's decisions in Oliver v. United States, 104 S.Ct. (1735) (1984) and Florida v. Riley, 109 S.Ct. 693 (1989).

In the case of Oliver, this Court noted that, "No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of governmental intrusion not authorized by warrant," and spoke of "societal understanding" and "societal expectations of privacy." In doing so, this Court noted a difference

between accessibility of the public to open fields as compared to homes, offices, and commercial properties. Id. at 1744. Unlike Oliver, the search here occurred on commercial property and not in an open field.

In the case of Riley, this Court found it to be of obvious importance, that the Florida Police who utilized a helicopter to survey a greenhouse in a residential backyard in which defendant was growing marijuana was not violating the law because of the specific altitude at which it had been flying. See Riley at 697. Unlike Riley, the government's informant in this case violated the law which prohibited anyone from rescuing garbage from the dumpster was violated.

The panel's decision has decided an important question of federal law in a vacuum that now conflicts with the Fourth

Amendment protection to commercial premises and the curtilage thereof. See U.S. Swart, 679 F.2d 698 (7th Cir. 1982); c.f. U.S. ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) (location of area searched outside the curtilage not protected by the Fourth Amendment), as well as the cases of Bahalik and Terry, cited in Greenwood. Accordingly, cert should be granted.

VII. IMPLICATIONS AND CONCLUSION

The Tax Code is a law of truly national application, affecting every citizen in the country. Yet, the Seventh Circuit decision, if not reversed, will result in an uneven application of that law. Henceforth, in the Seventh Circuit (and the Fifth Circuit), the GOVERNMENT need not elect the offense under Sec. 7201, evasion of payment or evasion of assessment. Rather, the GOVERNMENT will

be allowed to prosecute other defendants, as they did the PETITIONER, under a duplicitous and/or ambiguous indictment, i.e. "evading the tax". In other circuits, however, a defendant who is charged under Sec. 7201 will be entitled to know prior to trial whether he is charged with the crime of evading assessment of taxes or evading the payment of taxes. Further, a defendant will know well in advance whether the affirmative acts relied on and the evidence adduced by the GOVERNMENT is sufficient to justify a conviction under Sec. 7201. The uneven interpretation and application of the law is inappropriate and has denied the PETITIONER (and will deny others in the Seventh and Fifth Circuits) their Fifth and Sixth Amendment rights. The Seventh Circuit's requirement that a mistaken view of law

must be objectively reasonable to negate willfulness, and an instruction which allows a jury to conclude that PETITIONER acted willfully from a combination of suspicion and indifference to the truth, conflicts with the decisions of this Court and is inconsistent with the statutes under which PETITIONER was convicted and his Fifth and Sixth Amendments. Accordingly, the Petition for Writ of Certiorari should be granted.

DATED this 13 day of July, 1990.

MacPHERSON & McCARVILLE, P.A.

By _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petition for Writ of Certiorari and the Appedix thereto has been mailed, postage pre-paid in the United States mail, this 14th day of July, 1990, to:

Solicitor General
Department of Justice
10th & Constitution Avenues
Washington, DC 20530

Mark Pickrell (by permission)
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90-142

NO.

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. DUNKEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

		App. Page	Old* Page
A -	Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, April 16, 1990	1	(1)
B -	Order denying suggestion for rehearing en banc, May 11, 1990	16	(9)
C -	Constitutional Provisions and Statutes	18	(10)
D -	Excerpts from Vol. 7, Charge Conference	20	(12)
	D1 - Testimony of IRS Agent (Expert Witness)	45	(28)
	D2 - The Charge	49	(31)
E -	Order of United States Supreme Court Staying the Issuance of the Mandate of the United States Court of Appeals for the Seventh Circuit, May 25, 1990	53	(34)
F -	City of Rockford Ordinances	55	(36)

*( ) Old page references to Appendix previously submitted to the Court. All corrections made per letter of July 17, 1990.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 89-1841

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES C. DUNKEL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 88 CR 20010 - Stanley J. Roszkowski, Judge.

ARGUED DECEMBER 8, 1989 - DECIDED APRIL 16, 1990

Before POSNER and EASTERBROOK, Circuit Judges, and DUMBAULD, Senior District Judge.*

EASTERBROOK, Circuit Judge. James C. Dunkel, a dentist, decided in 1981 that the income tax is "voluntary". So he

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* Honorable Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

quit filing tax returns. Just in case the IRS should take a contrary view, Dunkel also started keeping two sets of books, excluding from one any cash receipts and checks that were endorsed over to his staff to pay their salaries without going through his bank accounts. Dunkel testified that he did these things to obtain more "privacy" than the banking system affords him. The jury concluded, however, that he did these things to evade tax, and that he also willfully failed to file his tax returns, in violation of 26 U.S.C. Secs. 7201 and 7203. The district judge sentenced him to three years' imprisonment, to be followed by five years' probation.

Some of the evidence used to convict Dunkel came from his refuse, which an informant culled. After California v. Greenwood, 486 U.S. 35 (1988), there is

no doubt that the contents of Dunkel's dumpster, in which financial records were mixed with worn-out teeth and discarded needles, were not within that zone of privacy to which the Fourth Amendment applies. Nonetheless, Dunkel contends that the dumpster was within the curtilage of his office, so that the informant needed a warrant (or his consent) to approach the dumpster in the first place. If the informant was not entitled to reach the dumpster, the fact that its contents had been abandoned could not justify the search. Consider the status of papers mixed with scrapings from dinner plates in a garbage bag in the kitchen. The police could not invade the home and rifle the bag, however, free their access to its contents would have been, given Greenwood, once it was put outside.

Dunkel owned and maintained his offices in a building that housed two other dentists and five business tenants. All used the same dumpster, which was located off the parting lot of the building, more than 55 feet from the nearest part of the structure. Dunkel's patients and employees, and those visiting other tenants of the building, used the parking lot. Anyone in the parking lot could walk up to the dumpster; the trash hauler that emptied the dumpster came in through the parking lot and needed no key or other entree'. After taking evidence, the district court found that "the fact that the garbage dumpster was being shared by other tenants . . . [and] was accessible to the public . . . supports the finding that there was no reasonable expectation of privacy; and although this dumpster was

170 feet into the property, I think it's clear that that dumpster was accessible to the public, as much as if it were sitting in any other open lot." This finding is not clearly erroneous.

Intoning "curtilage" does not alter the fact that the parking lot was open to all comers--not only Dunkel's invitees but also those of his seven tenants. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). See Oliver v. United States, 466 U.S. 170, 179-80 (1984) ("open fields" doctrine applied despite "no trespassing" signs). Dunkel's redoubt is United States v. Swart, 679 F.2d 698 (7th Cir. 1982), which held that agents could not enter the yard of an auto repair business to

read the vehicle identification numbers from cars there. No one other than Swart and his employees had access to the fenced-in yard where the cars were kept; this is a far cry from Dunkel's open parking lot with 32 spaces used throughout the day by many strangers. Someone who tosses documents into a dumpster to which hundreds of people have ready access has no legitimate expectation of privacy in the dumpster or its contents. United States v. Michaels, 726 F.2d 1307, 1312-13 (8th Cir. 1984), cited with approval in Greenwood, 486 U.S. at 42.

Only three of Dunkel's eight remaining arguments (most with multiple sub-parts) bear comment. Dunkel insists that the charges under Section 7201 are duplicitous because that statute creates two crimes: evading the assessment of

taxes (as by fooling the IRS about your income) and evading the payment of taxes (as by secreting assets after taxes have been assessed). To charge both in one count, Dunkel maintains, is to confuse both the defendant and the jury. Not so. Section 7201 creates only one crime: tax evasion. Section 7201 makes it a crime to "attempt in any manner to evade or defeat any tax imposed by this title or the payment thereof." Just as you can rob a bank in a dozen ways (blow the door off the vault, tunnel from next door and empty the till in the dead of the night, stick up the teller, scoop money out of the cash drawer during business hours when no one is looking, and so on), so you can evade taxes in multiple ways.

Sometimes it is convenient to say that different methods are different "crimes," as the Supreme Court once said

about Section 7201. Sansone v. United States, 380 U.S. 343, 354 (1965); see also United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984). Whether Section 7201 creates multiple offenses in the sense that one who evades his taxes for a single year both by creative bookkeeping and by transferring assets (as the jury could conclude Dunkel did) could be given cumulative punishment is a different matter entirely. If Dunkel were right, he could be punished twice, so long as the government took care to charge the events of a single year in two counts. We need not decide whether Congress has authorized this. It is enough to say that nothing in the text or history of Section 7201 requires an indictment to treat Section 7201 as if it were two sections of the United States Code. The grand jury must let the

accused know the nature and basis of the charge. Dunkel's indictment did so: it listed six specific ways in which he evaded taxes (five in 1981, three in 1983, with two methods used in each year). He knew exactly what he had to prepare the defend against, and the jury knew its role as well. United States v. Shorter, 809 F.2d 54, 58 (D.C. Cir. 1987); United States v. Hawkins, 781 F.2d 1483, 1484 (11th Cir. 1986).

Dunkel contends that 26 U.S.C. Section 7203 is unconstitutionally vague because it requires a taxpayer to "make" a return. No one could understand this, Dunkel insists. Maybe it means "fill in" a return; maybe it means "send in" a return; maybe it even means "construct a return out of raw materials." The district judge thought this frivolous and threatened sanctions. Dunkel's lawyer,

Donald. W. MacPherson, filed in the district court a blizzard of "unnecessary, duplicative and spurious motions, causing the Court to spend valuable time searching through 110 pages of motions which appear to be 'boilerplate' motions duplicated from a word processor." Although this court's Rule 30(a) requires the appellant to attach to his brief the opinions under review, MacPherson deleted from the district court's opinion the portion chastising him and warning that worse could follow. See In re Becraft, 885 F.2d 547 (9th Cir. 1989).

Statutes are not unconstitutional just because clever lawyers can invent multiple meanings. It is enough that a reasonable person can see what Congress is driving at. United States v. Powell, 423 U.S. 87, 93 (1975). Dunkel knew full

well that he had to fill in a return and file it. He had done both through the 1980 tax year. Making a tax return is a term of art for the combination of completing and filing; any accountant or lawyer would have told Dunkel so, had he asked. (Dunkel's accountant actually completed his 1981 return; Dunkel decided not to file it.) Marginal cases of genuine ambiguity can be tackled as they arise. United States v. Bradley, 892 F.2d 634, 636-37 (7th Cir. 1990). This is not one.

Both Section 7201 and Section 7203 require the district court to impose, as part of the punishment, the "costs of prosecution." Neither statute defines "costs," so courts regularly look to 28 U.S.C. Section 1920 for specification of the permissible amounts. E.g. United States v. Procario, 361 F.2d 683 (2d Cir.

1966); United States v. Vaughn, 636 F.2d 921, 922 (4th Cir. 1980). Section 1920(3) defines "[f]ees and disbursements for printing and witnesses" as part of costs; in turn 28 U.S.C. Section 1821(b) limits to $30 per day the "witness fee" an adversary must pay on top of those expenses. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The district court included as part of the judgment $2,037.36 in travel and subsistence costs of Terrence Catalina, the IRS case agent who was also the principal witness against Dunkel. He submits that these expenses are not allowable "costs" because Catalina is an employee of his adversary. Yet nothing in either Section 1920 or Section 1821 excludes a litigant's expenses in producing its employee as a witness, and 5 U.S.C. Section 5537(a)(2), which

prevents a federal official from receiving witness fees, does not speak to expenses. Catalina is not based in Rockford, Illinois (the site of Dunkel's trial). But for Dunkel's actions, the United States would not have incurred the expenses of transporting Catalina to Rockford and feeding and housing him there. So although no case we can find addresses the point (an oddity in view of the number of years these statues have been in force), we hold that the "costs" reimbursable under Section 1920, and therefore Section 7201 and 7203, include the expenses of transportation and subsistence for witnesses employed by the United States. Cf. Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935).

None of Dunkel's other contentions requires comment. We were surprised to discover, however, that the district

judge allowed Dunkel's lawyer to present evidence, and to argue to the jury, that a person's belief that "taxes are voluntary" is a defense to a criminal prosecution. Although only willful evasion or failure to file is criminal, in this circuit a mistaken view of the law does not negate willfulness in the defendant's legal belief is objectively unreasonable. E.g. United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S.Ct. 1108 (1990). Like the Lord High Executioner in the Mikado, we've "got a little list" of beliefs that are objectively unreasonable, such as that the 16th Amendment was not properly ratified and that wages are not income. See United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987). We add to that list the belief that payment of income taxes is

"voluntary." Juries should not be invited to decide for themselves whether it is "reasonable" to believe that the income tax is voluntary. Lawyers sometimes joke that the estate tax is a "voluntary tax" in the sense that with careful planning you can avoid it. No tax is "voluntary" in the sense that if you meet the statutory criteria for its imposition, you may elect not to pay. A goodly part of the business of district courts is creating object lessons of that fact. Dr. Dunkel has become another.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MAY 11, 1990

Before

HON. RICHARD A. POSNER, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. EDWARD DUMBAULD, Senior District Judge*

UNITED STATES OF AMERICA,	)	Appeal from the United States Court for the Northern District of Illinois, Western Division.
Plaintiff-Appellee,	)	
No. 89-1841	)	
v.	)	
JAMES C. DUNKEL,	)	No. 88 CR 20010 Stanley J. Roszkowski
Defendant-Appellant.	)	

Order

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on April 30, 1990. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel

have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

*Honorable Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

APPENDIX C
CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their ... papers and effects, against unreasonable searches and seizures shall not be violated ...

The Fifth Amendment to the United States Constitution provides in part:

> No person shall ... be deprived of life, liberty or property without due process of law ...

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed..., and to be informed of the nature and cause of the accusation; ... and to have the assistance of counsel for his defense.

26 U.S.C. Sec. 7201 provides in part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in

addition to other penalties provided by law be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 ... or imprisoned not more than five years or both, together with costs of prosecution.

26 U.S.C. Sec. 7203 provides in part:

Any person ... required by this title or by regulations made under authority thereof to make a return ... who willfully fails ... to make such return ... at the time or times required by law or regulation shall in addition to other penalties provided by law be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 ... or imprisoned not more than one year or both together with the cost of prosecution.

18 U.S.C. Sec. 3231 provides in part:

The district courts of the United States shall have original jurisdiction exclusive of the courts of the states of all offenses against the laws of the United States.

APPENDIX D

UNITED STATES OF AMERICA,	)	Docket No. 88CR20010
v.	)	Rockford, Illinois
JAMES C. DUNKEL,	)	Thursday, February 9, 1990
Defendant.	)	9:00 o'clock a.m.

VOLUME VII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
STANLEY J. ROSZKOWSKI,
and a jury

(Excerpts) pages 888-902; 928-930; 942-944; 1043-1046

THE COURT: ... All right. 31. The same ruling on 31 that I made back on the question of willfully. This is simply the statute, and I think that's all that's necessary.

What's your objection to 31? You say you want knowingly in there, too?

MR. MACPHERSON: No, sir, not knowingly in this part. I think my objection here is the problem of -- I have to see the statute.

THE COURT: Yes. I didn't have a copy of the statute at home with me, either.

MR. MACPHERSON: Oh, okay. Now I know. Okay. Now I know my objection.

It's an objection I've made from day one in this case, and that is -- and as the Seventh Circuit has recognized the Ninth Circuit case of U.S. v. Voorhies, there's two charges under this section, willful attempt to evade the assessment -- and that's the part, any tax imposed -- and willful attempt to evade the payment.

So, I still don't' know which he's charged with and --

THE COURT: It says evade or defeat.

MR. MACPHERSON: Well, but it's got both charges. It's got tax imposed. That's the assessment part. Or it's got the "or payment thereof," and that's the

payment part.

So, we have duplicity. We have a statute that permits two different charges, and I think the government should have elected -- and they still don't want to elect, and I still don't know what their theory is, whether he's charged with attempt to evade and defeat the assessment, tax imposed, or attempt to evade and defeat the payment of the tax that was assessed or imposed.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, your Honor, we've held by our position from the very get-going in this. We've told counsel repeatedly in pleadings, I've told him repeatedly in meetings, that the government's theory of the case is based on tax evasion. It's based on evading or defeating the tax imposed.

Counsel continues to bring up this Voorhies, which has been recognized by the Seventh Circuit; and if the court goes back to Voorhies, it recognizes that Voorhies is talking about a very specific fact pattern. It's 7201, involves both evasion of tax and after an assessment of the tax the evasion by hiding assets.

There has been no allegation in the affirmative acts that that's what occurred. There has been no allegation in the indictment that that's what occurred. There has been no allegation in any pleadings that that's what occurred, nd there's been no evidence that's been presented to this court that that's what occurred.

And I think he's continually bringing this up, and it's a red herring to the court. I'm not saying he's doing it under bad faith to the court, but I

just think that this is an issue that resolved against him and --

THE COURT: I agree, and I don't see any point in going on. I'm going to overrule the objection, and I'm going to give 31.

MR. MACPHERSON: May I say one la thing on it?

THE COURT: Sure.

MR. MACPHERSON: I don't mean to belabor it. I disagree with this characterization that we've been put on notice as to the pleadings or --

THE COURT: Well, I've been in this courtroom for eight days, or whatever it is now, and I've heard no other attempt to put any evidence in on any other subject.

MR. MACPHERSON: Well, then the "or the payment thereof" should not be included because that's not what he's

charged with.

From what I understand the government is saying, he's charged with attempting to evade the tax imposed, which is the assessment of the tax. So, the payment, he's not charged --

THE COURT: What you're saying is that that should end "Evade or defeat any tax imposed."

MR. MACPHERSON: Yes, sir.

THE COURT: What do you say to that, John?

MR. MCKENZIE: If that's his only objection, then I'll be glad to change it, your Honor.

THE COURT: Strike out "or the payment thereof"?

MR. MACPHERSON: Yes, sir....

THE COURT: All right. I'll give it as amended. 31.

32. This actually tracks exactly

what was in the previous statutory instruction, isn't it?...

MR. MACPHERSON: May I just have a moment to look at 32?

THE COURT: Sure....

MR. MACPHERSON: Judge, on 32, I knew there was something else. The second element did say evade or defeat the assessment of the tax -- or just the assessment.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, your honor, I think it's confusing to the jury. Moreover, the courts, when you track the statutory language, you're instructing correctly on the law, and that's what this instruction tries to do. It tracks the statutory language.

The Seventh Circuit has an instruction for 7201, and that's found

on, I think, Page 138 of the blue book.

The problem with that instruction is that instruction is geared towards a different factual pattern that's before the court. As you can read through it, that's when somebody files a return, and they fail to include all of their income on it.

It's also a fairly cumbersome instruction, and it doesn't seem to track the language of the statute directly. And what we've tried to do in the government's instruction is track exactly what the statute requires and track the fact pattern before the court.

MR. MACPHERSON: But it's not clear. Again, I'm back to what he's charged with, and 32 isn't clear as to whether he's charged with, and 32 isn't clear as to whether he's charged with defeat the assessment or defeat the payment.

So, just saying defeat the tax, that could be either payment or assessment.

MR. MCKENZIE: That's the crime charged in 7201, evade or defeat the tax. And, as you noted in the previous instruction, "or the payment thereof," that's not in it.

THE COURT: Well, that's certainly what he's charged with. I don't quite understand your objection to it.

You're saying that it's specifically intent to what? Evade the assessment or what? Avoid assessment?

MR. MACPHERSON: I'm saying that the second element should read as the Seventh Circuit Pattern on 138, which is the defendant intended --

THE COURT: Maybe I'm on a different instruction 1 I'm on 37.

MR. MACPHERSON: Oh, I'm sorry. I hadn't finished with 32.

THE COURT: I thought we were done with 32.

MR. MACPHERSON: No. I think you and John had moved to it, and I still had a problem with it.

THE COURT: What's your statement on that?

MR. MACPHERSON: The second element should read as the Seventh Circuit's Pattern on 138, and that is the defendant intended to evade or defeat the assessment.

THE COURT: Or payment?

MR. MACPHERSON: No. The "or payment," that's the other charge. So, it should be assessment of the additional tax.

THE COURT: What's your position on that, John?

MR. MCKENZIE: Judge, I think you have to go back to the statute. This is

the one I was referring to, and I don't think I was clear, your Honor, that this is the charge that really -- this instruction is really directed towards when someone files a return and understates their income on it. It's drafted for those factual patterns.

THE COURT: Here he didn't file a return.

MR. MCKENZIE: That's correct. And I think this court would be safer in following the language of the statute. The statute says evade or defeat the tax and payment thereof.

Now, we've agreed that the "and payment thereof" is not what he's charged with. He's not charged with having been assessed a tax and avoiding payment thereof by hiding his assets.

THE COURT: Well, I think the instruction accurately tracks the factual

situation here, and I'm going to give it.

Let's go to 37. And I take it that your objection would be the same on this one?

MR. MACPHERSON: Just a moment, please. Right. Now we're talking about payment. I think they keep switching horses midstream with me, Judge. It's difficult to defend when -- well, I've said it enough times.

THE COURT: All right. Just a minute. To evade or defeat a tax, which it was a legal duty of the defendant.

MR. MACPHERSON: It should be assessment, defeat the assessment, and forget the payment part.

THE COURT: Why couldn't we amend this slightly to say it was a legal duty of the defendant --

MR. MACPHERSON: The Seventh Circuit has a pattern on it, Judge, on 140; and I

think we should follow the pattern, which would be given -- now that they've clarified what he's charged with, it should be specific intent to avoid assessment of the tax.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, Judge, again, as in the other one, this particular instruction is drafted in the factual scenario of someone who files a return and doesn't report all their income. It's not drafted towards what we have here.

And again, I think the best way of doing this is the instruction we've tendered. It follows the facts before the court and before the jury, and it also tracks the law.

And I'd have some strong objections, your Honor, if it's changed in some way

to all of a sudden talk to the jury about assessment. That's not what he's charged with. He's charged with evasion, evading or defeating the tax. That's the statute.

MR. MACPHERSON: It's my understanding he's charged with willfully and knowingly attempting to evade the assessment of the tax. That's the election, I understand.

MR. MCKENZIE: There's no election, Mac. I've gone over that. He's been charged with the crime. There's no election needed.

I mean, you can call it election for the record, but that doesn't make it election.

MR. MACPHERSON: Well, your characterization.

THE COURT: I don't see how it changes the factual situation and the law

in this case. The fact is that he's charged with attempting to evade his taxes, isn't he, which was a legal duty to pay the government, which he knew was a legal duty.

MR. MACPHERSON: But there's two offenses to that, as the Seventh Circuit recognizes at 138 and then at 140 ....

And then 140, again, they say choose the appropriate terms, and they give the brackets, and I agree with their brackets, and I agree with their assessment.

THE COURT: It says, this section -- looking at Page 138 at the bottom, it says, "This section includes both attempts to avoid payments of taxes and attempt to avoid assessment of taxes." That includes both.

MR. MACPHERSON: The 7201 includes both. That's what I've been saying.

There's two crimes under 7201, and one is attempt to avoid payment, and one is attempt to avoid assessment.

THE COURT: Well, let me take a look at those when I have a chance.

MR. MACPHERSON: Yes, sir.

THE COURT: We'll reserve ruling. That would be what? 32 and 37?

MR. MCKENZIE: Yes, sir.

THE COURT: 32 and 37. All right. Let me take a look at that ...

39. This is the latest direction from the Seventh Circuit. It's right out of Ramsey, r.ght out of Diaz. No question about it. I don't know what the objection is. It's exact language.

MR. MACPHERSON: I know, but the prosecutor earlier was talking about how sometimes these instructions don't fit the factual pattern. This one doesn't fit the factual pattern here. But these

other cases weren't -- the case in which this is taken out of, the exact language, is not a tax case.

THE COURT: Oh, yes, it is. It's a case I tried.

MR. MACPHERSON: No, I mean --

THE COURT: It's a case I tried. It's United States v. Ramsey.

MR. MACPHERSON: Well, I don't think that's the one I'm talking about.

THE COURT: I have it right here. We don't need to look it up.

MR. MACPHERSON: There's another one then where the same language was used.

THE COURT: And there's another one -- there's another one, also, that uses the same language.

Here's Buckner, and I think it's even in that case, too. But it's in Ramsey.

MR. MACPHERSON: It was in Diaz.

THE COURT: I read it yesterday.

MR. MACPHERSON : D-i-a-z, which is --

THE COURT: D-i-a-z. It's in Diaz, too, as well.

MR. MACPHERSON: Conspiracy and cocaine. It was a drug case in Diaz.

THE COURT: Let me see if I have it. I have it in my briefcase, I think.

In any event, it's exact language taken right out of the case. No doubt of that. I'm going to give it. I checked it yesterday. It's right out of United States v. Ramsey.

In fact, they were a little bit critical of me because I gave a little bit different instruction, and they said, well, it was okay, but this is better. And Judge Easterbrook wrote the instruction out.

And I think you took it right out of

that case, didn't you, John?

MR. MCKENZIE: Yes, sir.

THE COURT: Those two cases. Ramsey was a 1986 case. Diaz is a 1988 case. I don't know how much more current I could find, language.

MR. MACPHERSON: Probably not much more, but I don't think it's supported by the factual pattern in this case.

THE COURT: All right. Well, let the record show it's given over objection.

MR. MACPHERSON: 40 -- are we ready for 40, your Honor?

THE COURT: Yes.

MR. MACPHERSON: 40, of course, I've submitted a charge, and I realize this is the state of the law as between more -- it's Seventh Circuit -- this objective versus subjective reasonably, and I've submitted an instruction on that, which

we'll get to later.

THE COURT: You know, I agree that there's some disagreement among the circuits; but, as I told you at the beginning, I follow the United States Supreme Court decisions wherever possible. If there isn't a Supreme Court decision on it, I follow the Seventh Circuit. This is right out of the Seventh Circuit.

I had drawn one that I think is, perhaps, more clear than this one, and I would read it to you and see.

A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable. Mere disagreement with the law does not constitute such a misunderstanding must be objectively

reasonable. Mere disagreement with the law does not constitute such a misunderstanding nor a defense in this case.

Because I think that everyone is presumed to know the law and follow it, whether they agree with it or not....

MR. MACPHERSON: Let me just check, you Honor. That would be 32.

No. My position is that their 32, which is the elements, doesn't properly state the elements as proposed by the Seventh Circuit and that the second element should read the defendant intended to evade or defeat the assessment of the additional income tax.

THE COURT: But not the payment?

MR. MACPHERSON: He's not charged -- you take out the payment. You choose one or the other. And from what I understand of their theory, their theory is he

attempted to evade or defeat the assessment. So that's the language you use.

I mean, this is a situation in which I agree totally with the Seventh Circuit on that element, and it's just a matter of choosing one or the other; and once you choose the one, then you use the language that they recommend.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, we finally have Mr. MacPherson in agreement with the Seventh Circuit. The problem is this instruction doesn't match the crime involved. This instruction matches the crime when someone fails to report all their income.

And I think we've been over this, and the court is aware of the government's position. The government

prefers to go by what the statute says, when the Seventh Circuit hasn't directly addressed the issue, and that's why we've drafted Government's 32.

THE COURT: All right. I'm going to cut this short, and I'm going to agree that -- I'm going to give the government's instruction on these and refuse the others.

MR. BRODY: So, you're going to give 32 and 37 and refuse 73 and 74?

THE COURT: Yes. As I look at them, I think that's proper in the facts in this case.

75.

MR. MACPHERSON: 75, Judge, I would move to strike at the end of the government's case-in-chief, and I'll move again when we close the evidence of the failure to file and the failure to pay.

I don't believe it's proper to have

in the indictment affirmative acts and the list acts that are affirmative and then list things that aren't affirmative acts in that list.

I didn't say that very well. Let me say it again, if I may. They have listed several things that are affirmative acts, and they said these are the affirmative acts. With that listing they've also said the failed to file and he failed to pay the estimated tax. Those are not affirmative acts, and they have no business being included in a list of affirmative acts, and they should be taken out of the indictment and this instruction given.

It's just the same as if -- my theory, at least, is it's the same as if you have a conspiracy charge and acts in furtherance of the conspiracy, and the government doesn't prove them up. Well,

it's a little different in that if they proved them up, they proved that he failed to file nd that he failed to pay, but the Supreme Court has said that those aren't affirmative acts; they're failures to act.

MR. MCKENZIE: Judge, we've been through this before in pretrial. The Spies case said you can't convict on tax evasion when you don't have a commission, as opposed to omission. It didn't say that these acts of omissions weren't chargeable as affirmative acts.

In fact, we've charged them as affirmative acts throughout all of the Northern District of Illinois for many years now.

THE COURT: Yes. We've gone through that, and I think it's been covered, and I'm going to refuse it.

APPENDIX D-1
TESTIMONY OF IRS AGENT KELLEY KILCOIN

THE COURT: Do you realize, Mr. Kilcoin, you're still under oath?

THE WITNESS: Yes, I do.

BY MR. MACPHERSON:

Q. Sir, for the year 1983 and what's in evidence as to third-party checks that the defendant endorsed over for expenses, have you made any calculation as to what tax would be due and owing for 1983 from that income reflected on those checks that were signed over for expenses?

A. I made a calculation that included all the income that he had.

Q. My question is did you make an independent calculation as to just the third-party checks?

A. No, I did not.

Q. And as to 1981, same question. Did you make an independent calculation as to

what tax would be due and owing just from income reflected on the third-party checks?

A. No, I did not.

Q. Same question for 1982 as to what tax would be due and owing from the receipt of the silver coins from Dr. Dunkel (sic).

MR. MCKENZIE: Your Honor, I'm going to object to 1982. Tax evasion is not alleged in that year.

MR. MACPHERSON: If I said '82, I meant '81.

THE COURT: '81. All right.

BY THE WITNESS:

A. No, I didn't make any independent calculation.

BY MR. MACPHERSON:

A. And for 1981, did you make any independent calculation as to what tax would be due and owing from any income

that would be reflected on depositing and cashing checks at an out-of-town bank?

A. No, I did not.

MR. MACPHERSON: Pass the witness, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. MCKENZIE:

Q. Mr. Kilcoin, it's your testimony when you talk about calculation of income, that's based on total income; is that correct?

A. That's true.

Q. And, in fact, when you calculate income, you don't go and say your income tax on this income would be this and this income would be this, do you?

A. No, I don't do that.

A. You do it on a full basis?

A. Yes.

Q. Where all the facts are disclosed?

A. Yes.

MR. MCKENZIE: Thank you, your Honor.

MR. MACPHERSON: Briefly, your Honor.

REDIRECT EXAMINATION

BY MR. MACPHERSON:

Q. Sir, considering that you've done it on all of the income, I take it then you wouldn't be able to tell the jury what amount of tax the defendant attempted to evade by depositing the checks in an out-of-state bank for '81, using third-party checks for '81, or receiving sliver for '81?

A. I wouldn't be able to tell you about the tax for any specific item, no.

Q. And that would be the same as to '83?

A. That's correct.

APPENDIX D-2
THE CHARGE

... Title 26, United States Code, Section 7201 provides in relevant part as follows: Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title shall be guilty of the crime of willfully attempting to evade taxes.

To sustain the charges of attempting to evade or defeat a tax, as charged in Count 1, tax year 1981, and Count 4, tax year 1983, of the indictment, the Government must prove the following propositions:

First, a substantial tax was due and owing by the Defendant;

Second, the Defendant intended to evade or defeat the tax;

Third, the Defendant willfully did some act in furtherance of this intent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the Defendant guilty ...

The evidence need not prove each affirmative act alleged in the indictment for each year in question. However, to sustain the charge of willfully attempting to evade taxes, the Government must show more than a failing by the Defendant to make an income tax return to the Internal Revenue Service.

An affirmative act of the Defendant is an act, the likely effect of which would be to mislead or conceal. If the tax evasion motive plays any part of such act, the act may be an affirmative act, even though the act may serve other purposes, as well ...

With respect to the charges of tax

evasion contained in Count 1, 1981, and Count 4, 1983, the term willfully means voluntarily and intentionally, with the specific intent to evade or defeat a tax which was the legal duty of the Defendant to pay to the Government and which the Defendant knew it was his legal duty to pay.

The word knowingly means that the Defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the Defendant's conduct and by all the facts and circumstances surrounding the case.

You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had

withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word.

A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable.

APPENDIX E
SUPREME COURT OF THE UNITED STATES

No. A-819

JAMES C. DUNKEL,

Applicant,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the Solicitor General having presented no objection,

IT IS ORDERED that issuance of the mandate of the United States Court of Appeals for the Seventh Circuit, case No. 89-1841, be and the same is hereby stayed pending the timely filing of a petition for a writ of certiorari. If the petition is so timely filed, this order is to remain in effect pending this

Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue in effect pending the sending down of the judgment of this Court.

/s/ John Paul Stevens

Associate Justice of the
Supreme Court of the
United States

Dated this 25th
day of May, 1990.

APPENDIX F

CITY OF ROCKFORD ORDINANCES (FROM DEFENDANT'S HEARING, EXHIBIT 9)

Sec. 13-25. Refuse not to be collected.

> The following refuse shall not be collected or disposed of by the city:
>
> (a) Dangerous materials or substances such as poisons, acids, caustics, infected materials ...

Sec. 13-26. Containers required.

> No person owning or occupying any building, lot or premises shall allow any refuse to collect or remain upon said lot or premises except in an approved container tightly covered ...

Sec. 13-23. Interference with receptacles.

> No person other than the owner thereof or any officer, employee, contractor or licensee of the city shall move, remove or interfere with any garbage or waste matter receptacle or the contents thereof.

Sec. 19-21. Trespass.

A person commits trespass when he knowingly:

(a) enters the property or any part thereof of another when immediately prior to such entry he receives notice, either oral or written, from the owner or the occupant that such entry is forbidden....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS G. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether in this prosecution for willful violation of the criminal tax laws, the district court erred in instructing the jury that willfulness may be negated by an asserted good faith misunderstanding of the law only if that misunderstanding was objectively reasonable.

2. Whether the district court erred in instructing the jury that knowledge of the law may be inferred from strong suspicion of and indifference to the truth.

3. Whether the counts of the indictment charging tax evasion were duplicitous.

4. Whether the evidence was sufficient to sustain petitioner's convictions on the tax evasion counts.

5. Whether petitioner's Fourth Amendment rights were violated by a government informant's retrieval of certain documents from a trash dumpster located in his office parking lot.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bollenbach v. *United States*, 326 U.S. 607 (1946)	15
California v. *Greenwood*, 486 U.S. 35 (1988)	4, 18
Cheek v. *United States*, cert. granted, 110 S. Ct. 1108 (1990)	5, 20
Cohen v. *United States*, 297 F.2d 760 (9th Cir. 1962)	9
Crain v. *United States*, 162 U.S. 625 (1896)	10
Katz v. *United States*, 389 U.S. 347 (1967)	4, 19
Lawn v. *United States*, 355 U.S. 339 (1958)	9, 10
Oliver v. *United States*, 466 U.S. 170 (1984)	18
Sansone v. *United States*, 380 U.S. 343 (1964)	10, 11
Spies v. *United States*, 317 U.S. 492 (1943)	14, 16
Turner v. *United States*, 396 U.S. 398 (1970)	8
United States v. *Bishop*, 412 U.S. 346 (1973)	6
United States v. *Bryan*, 868 F.2d 1032 (9th Cir.), cert. denied, 110 S. Ct. 167 (1989)	11
United States v. *Cheek*, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S. Ct. 1108 (1990)	5
United States v. *Cincotta*, 689 F.2d 238 (1st Cir.), cert. denied, 459 U.S. 991 (1982)	8
United States v. *Dack*, 747 F.2d 1172 (7th Cir. 1984)	13
United States v. *Diaz*, 864 F.2d 544 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989)	7
United States v. *Doe*, 465 U.S. 605 (1984)	18
United States v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990)	12

Cases—Continued: Page

United States v. *England*, 347 F.2d 425 (7th Cir. 1965) 13
United States v. *Glick*, 710 F.2d 639 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) 7
United States v. *Hawkes*, 753 F.2d 355 (4th Cir. 1985) 11
United States v. *Jewell*, 532 F.2d 697 (9th Cir.) cert. denied, 426 U.S. 951 (1976) 8
United States v. *Johnson*, 319 U.S. 503 (1947) 11
United States v. *Knight*, 705 F.2d 432 (11th Cir. 1983) 7
United States v. *MacKenzie*, 777 F.2d 811 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986) 7
United States v. *Masat*, 896 F.2d 88 (5th Cir. 1990) 13, 14
United States v. *Massa*, 740 F.2d 629 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985) 7
United States v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984) 19
United States v. *Murdock*, 290 U.S. 389 (1933) 6
United States v. *Pomponio*, 429 U.S. 10 (1976) 6
United States v. *Restrepo-Granda*, 575 F.2d 524 (5th Cir.), cert. denied, 439 U.S. 935 (1978) 8
United States v. *Robinson*, 651 F.2d 1188 (6th Cir.), cert. denied, 454 U.S. 875 (1981) 12
United States v. *Shorter*, 809 F.2d 54 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987) 11, 12
United States v. *Terry*, 702 F.2d 299 (2d Cir.), cert. denied, 461 U.S. 931 (1983) 19
United States v. *Vahalik*, 606 F.2d 99 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980) 19
United States v. *Waldeck*, No. 89-2152 (1st Cir. July 12, 1990) 13, 14
United States v. *White*, 879 F.2d 1509 (7th Cir. 1989), cert. denied, 110 S. Ct. 1471 (1990) 11
Wisniewski v. *United States*, 353 U.S. 901 (1957) 13

Constitution and statute and rule: Page

U.S. Const. Amend. IV 3, 4, 17, 18, 19
Internal Revenue Code (26 U.S.C.):
§ 7201 ..... *passim*
§ 7203 2
Fed. R. Crim. P. 8(a) 9

Miscellaneous:

1 C. Wright, *Federal Practice & Procedure* (2d ed. 1982) 9, 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-142

JAMES C. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 900 F.2d 105.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1990, and a petition for rehearing was denied on May 11, 1990. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on July 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of willfully attempting to evade taxes for the years 1981 and 1983, in violation of 26 U.S.C. 7201 (Counts 1 and 4), and three counts of willfully failing to file income tax returns for the years 1981, 1982 and 1983, in violation of 26 U.S.C. 7203 (Counts 2, 3 and 5). Gov't C.A. Br. 2. Petitioner was sentenced to a three-year term of probation. Pet. App. 2a. The court also ordered petitioner to pay fines in the amount of $15,000 and to perform 500 hours of community service. Gov't C.A. Br. 3.

1. Petitioner is a self-employed dentist. Prior to 1981, he filed federal income tax returns and made timely estimated tax payments. In 1981, however, he decided that the income tax is "voluntary." He stopped filing tax returns and began keeping two sets of books, one of which excluded cash receipts and third-party checks that were endorsed over to his staff to pay their salaries. Pet. App. 1a-2a, 10a-11a; Gov't C.A. Br. 5.

Petitioner owned the office building in which he conducted his dental practice. He also rented office space to two other dentists and five business tenants. From 1981 to 1983, petitioner collected rental payments, ranging between $29,000 and $37,000 annually, and he collected rent in the form of silver coins from Louis Snider in the early 1980s. Petitioner also received payment, sometimes in the form of cash, for antique cars that he restored and sold. Pet. App. 4a; Gov't C.A. Br. 6, 7.

Delinquent returns, filed by petitioner six months after he was informed that he was the subject of a

criminal investigation, reflect that he owed $15,640 in delinquent taxes. According to his testimony at trial, he had paid only $5,100 of that amount. Gov't C.A. Br. 10.

2. Prior to trial, petitioner moved to suppress certain documents that an informant had retrieved from a metal trash dumpster in petitioner's office parking lot. Petitioner argued that the documents were obtained in violation of the Fourth Amendment. At the suppression hearing, it was established that the dumpster was located more than 55 feet from the nearest part of petitioner's office building; that the dumpster was used by two other dentists and five business tenants; that patients, employees and visitors of other building tenants used the parking lot; that the lot was open to the public; and that the dumpster was unlocked and accessible to passers-by. Pet. App. 4a. After the two-day evidentiary hearing, the district court denied the suppression motion, finding that petitioner had no reasonable expectation of privacy in the dumpster since "th[e] dumpster was accessible to the public, as much as if it were sitting in any other open lot." *Id.* at 4a-5a.

3. At petitioner's trial, the government proposed, and the district court gave, the following instruction concerning the attempted tax evasion counts (Pet. App. 52a; Gov't C.A. Br. 27):

> A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable. Mere disagreement with the law does not constitute such a misunderstanding nor a defense in this case because it is the obliga-

tion of all persons to obey the law whether or not they agree with it.

4. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-15a. It first rejected petitioner's Fourth Amendment challenge to the use of evidence taken from the dumpster. Relying on *California* v. *Greenwood*, 486 U.S. 35 (1988), the court of appeals had "no doubt that the contents of [petitioner's] dumpster, in which financial records were mixed with worn-out teeth and discarded needles, were not within that zone of privacy to which the Fourth Amendment applies." Pet. App. 2a-3a. The court was equally unpersuaded by petitioner's argument that he had a legitimate expectation of privacy in the dumpster because it was within the curtilage of his office, concluding that the district court's finding that the dumpster was accessible to the public was not clearly erroneous. *Id.* at 5a. Quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967), the court noted that the Fourth Amendment does not protect that which a person knowingly exposes to the public, even in his home or office. Pet. App. 5a.

The court of appeals likewise found no merit to petitioner's argument that the attempted tax evasion charges improperly alleged both attempted evasion of the assessment of a tax and attempted evasion of the payment of a tax. The court observed that neither the text nor the legislative history of Section 7201 requires an indictment to treat that provision as if it were two sections of the United States Code, one applicable to evasion of assessment and one applicable to evasion of payment. Moreover, the court held that the indictment clearly advised both petitioner and the jury of the nature and basis of the charge by

specifically listing the ways in which he evaded taxes. Pet. App. 6a-9a.

Finally, the court rejected petitioner's challenge to the jury instructions, citing its prior decision in *United States* v. *Cheek*, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S. Ct. 1108 (1990), for the proposition that "a mistaken view of the law does not negate willfulness [i]f the defendant's legal belief is objectively unreasonable." Pet. App. 14a.[1]

ARGUMENT

1. Petitioner first contends (Pet. 19-28) that the court of appeals erred in holding that a good faith misunderstanding of the law must be objectively reasonable in order to constitute a defense in a prosecution for a willful violation of the tax laws. That same issue is presented in *Cheek* v. *United States*, cert. granted, 110 S. Ct. 1108 (1990) (to be argued Oct. 3, 1990). We therefore suggest that the Court hold the petition in the instant case and dispose of it as appropriate in light of the decision in *Cheek*.

2. Petitioner next contends (Pet. 28-29) that the "ostrich" or "conscious avoidance" instruction given by the district court on the attempted tax evasion counts departs from the standard of "willfulness" under 26 U.S.C. 7201. The instruction, however, is fully consistent with prior holdings of this Court and decisions of all courts of appeals that have addressed the validity of such an instruction.

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[1] On May 25, 1990, Justice Stevens granted petitioner's application for a stay of the mandate of the court of appeals pending the disposition of his petition for a writ of certiorari, in light of petitioner's assertion that his petition would raise the same issue on which certiorari has been granted in *Cheek*. Pet. App. 53a-54a.

The specific instruction to which petitioner objects reads:

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word.

Pet. App. 51a-52a. Petitioner asserts that this instruction incorrectly informed the jury that willfulness may be inferred from a combination of suspicion and indifference to the truth. The language of the instruction, however, clearly allows the jury to infer only knowledge, not willfulness.

When read in context, it is apparent that the instruction at issue did not, as petitioner argues (Pet. 29), lower the standard of willfulness articulated in *United States* v. *Bishop*, 412 U.S. 346 (1973), and *United States* v. *Pomponio*, 429 U.S. 10 (1976), to one of "careless disregard or reckless indifference to the truth" or negligence.[2] The challenged instruction was given immediately after, and with reference to, the following instructions concerning the willfulness element of 26 U.S.C. 7201:

> With respect to the charges of tax evasion contained in Count 1, 1981, and Count 4, 1983, the term willfully means voluntarily and intention-

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[2] In addition, in *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933), upon which petitioner extensively relies (Pet. 20-23, 29), the Court stated that the term "willfully" is employed in criminal statutes to characterize "conduct marked by careless disregard whether or not one has the right so to act."

> ally, with the specific intent to evade or defeat a tax which was the legal duty of the Defendant to pay to the Government and which the Defendant knew it was his legal duty to pay.
>
> The word knowingly means that the Defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the Defendant's conduct and by all the facts and circumstances surrounding the case.

Pet. App. 50a-51a. The instruction at issue here simply explained the significance of circumstantial evidence from which the jury might infer that petitioner knew he had a legal duty to pay taxes. The instruction did not relieve the government of its burden of proving willfulness as defined by the court. The jury still was required to acquit petitioner if it did not find that he acted, in the words of the willfulness instruction just quoted, "voluntarily and intentionally, with the specific intent to evade or defeat a tax which it was the legal duty of the Defendant to pay to the Government, and which the Defendant knew it was his legal duty to pay."

Conscious avoidance instructions have been approved by every circuit that has considered them. See, *e.g.*, *United States* v. *Diaz*, 864 F.2d 544, 550 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989); *United States* v. *MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Massa*, 740 F.2d 629, 643 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); *United States* v. *Knight*, 705 F.2d 432, 434 (11th Cir. 1983); *United States* v. *Glick*, 710 F.2d 639, 642 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984);

United States v. *Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *Restrepo-Granda*, 575 F.2d 524, 528-529 (5th Cir.), cert. denied, 439 U.S. 935 (1978); *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Cf. *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970). Thus, review of the conscious avoidance instruction is not warranted.

3. a. Petitioner contends (Pet. 29-35) that the tax evasion charges in the indictment were duplicitous. The court of appeals correctly rejected that claim, Pet. App. 6a-9a, and its ruling does not conflict with any decision of this Court or any other court of appeals.

Counts 1 and 4 charged petitioner with attempted tax evasion for 1981 and 1983, in violation of 26 U.S.C. 7201. Section 7201 provides (emphasis added):

> Any person who willfully *attempts in any manner to evade or defeat any tax imposed by this title* or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 * * *, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The pertinent language of the tax evasion counts in this case directly tracked the emphasized portion of the statutory text by charging that petitioner "did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America." Each count then identified specific steps petitioner took to evade the tax. See Pet. 4-5.

On appeal, petitioner argued that the indictment was fatally duplicitous[3] because it could be read to charge him with both attempted evasion of assessment and attempted evasion of payment; in his view, 26 U.S.C. 7201 requires those means of evasion to be treated as wholly distinct crimes and to be charged in separate counts. The court of appeals rejected petitioner's claim. Pet. App. 6a-9a. In doing so, the court expressly did not decide whether 26 U.S.C. 7201 creates multiple offenses in the sense that it would *permit* the government, in an appropriate case, to charge a person who evades his taxes for a single year both by creative bookkeeping (to evade assessment) and by concealing assets (to evade payment) with separate offenses and subject him to cumulative punishments. Pet. App. 8a. That issue was not presented because the government did not charge petitioner with separate offenses. Compare *Lawn* v. *United States*, 355 U.S. 339, 341-342 n.1, 343 nn.4 & 5 (1958), and *Cohen* v. *United States*, 297 F.2d 760 (9th Cir. 1962), cited by petitioner (Pet. 31-32, 34, 37). The court of appeals held only that the government may charge a violation of 26 U.S.C. 7201 as a single offense, observing that "nothing in the text or history of Section 7201 requires an indictment to treat Section 7201 as if it were two sections of the United States Code." Pet. App. 8a.

Contrary to petitioners' assertion (Pet. 31-33), the court of appeals' rejection of his duplicity claim does not conflict with *Lawn* v. *United States*, *supra*, or

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[3] " 'Duplicity' is the joining in a single count of two or more distinct and separate offenses." 1 C. Wright, *Federal Practice & Procedure* § 142, at 469 (2d ed. 1982). Fed. R. Crim. P. 8(a) requires that "each offense" be charged in a "separate count" of the indictment.

Sansone v. *United States*, 380 U.S. 343 (1964). In neither case did the Court hold that a single count alleging both evasion of assessment and evasion of payment would be duplicitous; that issue was not before the Court. *Lawn* merely recited, in footnotes, the means of attempted evasion found by the court of appeals in that case. 355 U.S. at 343 nn.4 & 5. *Sansone* noted, citing *Lawn*, that Section 7201 "includes" the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax. 380 U.S. at 354. The defendant in *Sansone* had argued that although he willfully and fraudulently understated his tax liability for the year involved, he intended to pay his tax in the future and therefore could not be convicted of attempted tax evasion. *Ibid.* Noting that "[t]he indictment * * * charged an attempt to evade income taxes by defeating the assessment," the Court held that even if the defendant intended to pay the tax, that fact would not provide a defense to his attempted evasion of the assessment of the tax. *Ibid.* In other words, as the court of appeals held in the instant case, one can evade taxes by different methods. Thus, in *Sansone*, the fact that the defendant did not violate the statute by one means (evasion of payment) did not preclude the possibility that he violated it by another (evasion of assessment). That holding does not suggest that a defendant may not be charged in a single count with violating the statute by *both* means. *Crain* v. *United States*, 162 U.S. 625, 636 (1896).

Moreover, this Court and the courts of appeals have held that unlawful acts that in some circumstances might be treated as separate offenses may be the subject of a single count charging a single viola-

tion if those acts are part of one overall scheme or course of conduct. See *United States* v. *Johnson*, 319 U.S. 503, 513-515 (1947) (tax evasion); *United States* v. *White*, 879 F.2d 1509, 1512 (7th Cir. 1989), cert. denied, 110 S. Ct. 1471 (1990); *United States* v. *Bryan*, 868 F.2d 1032, 1037-1038 (9th Cir.), cert. denied, 110 S. Ct. 167 (1989); *United States* v. *Shorter*, 809 F.2d 54, 56-57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987); *United States* v. *Hawkes*, 753 F.2d 355, 357-358 (4th Cir. 1985). Similarly in this case, the specific acts underlying the charges of tax evasion in Counts 1 and 4 were part of one overall course of conduct in each count. See Pet. 4-5; pages 14-15, *infra*.

Even if Section 7201 did define two distinct offenses that may never be charged in the same count, petitioner would not be entitled to reversal of his convictions on the evasion counts in this case. As noted above, the language of Counts 1 and 4 tracked the language of the first portion of Section 7201 proscribing attempted evasion or defeat of a tax—the portion described in *Sansone* as prohibiting evasion of assessment. 380 U.S. at 354. Those counts did not charge an attempt to evade or defeat the payment of a tax, which is referred to in the next portion of Section 7201. Thus, the relevant counts charged only one of the two offenses that petitioner perceives in Section 7201, and those counts therefore were not duplicitous.[4]

Finally, even where, unlike here, an indictment is duplicitous, that pleading defect is not fatal and does not require dismissal of the count. 1 C. Wright, *Fed-*

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[4] As the court below observed, those counts also fully informed petitioner of the nature and basis of the charge. Pet. App. 8a-9a.

eral Practice and Procedure § 142, at 475 (2d ed. 1982). The appropriate remedy is to require the government to elect upon which charge contained in the count it will rely. *Id.* § 145, at 523; see *United States* v. *Robinson*, 651 F.2d 1188, 1194-1195 (6th Cir.), cert. denied, 454 U.S. 875 (1981).[5] Because, as just explained, the relevant counts in this case were not duplicitous even under petitioner's view of 26 U.S.C. 7201, there was no need for the government to make such an election. It nevertheless is noteworthy that consistent with the theory of the indictment (which charged attempted evasion and defeat of the tax, not of payment), the jury instructions did not give the jury the option of convicting petitioner of attempted evasion of payment.[6] The district court's description of Section 7201 referred only to an attempt "in any manner to evade or defeat any tax imposed by this title," without any reference to evasion of payment, Pet. App. 49a; the

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[5] This remedy is sufficient to serve the purposes of the non-duplicity rule, as explained in C. Wright, *supra*, § 142, at 475:

> The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice [the] defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy.

Accord, *United States* v. *Duncan*, 850 F.2d 1104, 1108-1109 n.4 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990); *United States* v. *Shorter*, 809 F.2d at 58.

[6] In fact, references to evasion of payment were specifically deleted from the proposed instructions at petitioner's insistence, based on the very duplicity arguments he now advances in this Court. See Pet. App. 21a-35a.

court's recitation of the elements of the offense made no reference to evasion of payment, *ibid.*; and the court defined an affirmative act as "an act, the likely effect of which would be to mislead or conceal," *id.* at 50a, a description that pertains to evasion of assessment.

In addition to the Seventh Circuit in the instant case, both the First and the Fifth Circuits have examined the issue recently and determined that an indictment such as that under which petitioner was charged is not fatally duplicitous. See *United States* v. *Waldeck*, No. 89-2152 (1st Cir. July 12, 1990), slip op. 5-10 [7]; *United States* v. *Masat*, 896 F.2d 88, 91 (5th Cir. 1990). At the same time, there is no conflict with other appellate decisions that might justify review on this issue. Although the cases on which petitioner relies (Pet. 33-34) describe Section 7201 as including two different offenses, they do not suggest that a count that alleges both attempted evasion of assessment and attempted evasion of payment of the same tax is duplicitous.[8] *A fortiori*, they do not suggest that counts (such as those at issue here) that do not allege evasion of both the tax and its payment are duplicitous.

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[7] In *Waldeck*, the court did not have to decide whether Section 7201 defines two crimes, because it concluded that the indictment charged only evasion of assessment. Slip op. 9.

[8] The Seventh Circuit did not so hold in *United States* v. *England*, 347 F.2d 425 (1965), or *United States* v. *Dack*, 747 F.2d 1172 (1984), cited by petitioner in support of his claim of an intra-circuit conflict (Pet. 34). In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

b. Proceeding on his assumption that Section 7201 creates two distinct crimes, petitioner challenges (Pet. 35-39) the determination by the court of appeals that the indictment adequately informed petitioner of "what he had to prepare to defend against" and that the jury understood what it was being asked to decide. Pet. App. 8a-9a. He appears to assert that there must be a definitive identification of evidence to show whether it supports either evasion of assessment or evasion of payment. Petitioner's argument rests on the erroneous premise that evasion of assessment and evasion of payment cannot be proved by the same affirmative acts. Although *Spies* v. *United States*, 317 U.S. 492 (1943), construed Section 7201 to require proof of an affirmative act of evasion, it did not require that the affirmative act be identified as one exclusively supporting either attempted evasion of assessment or attempted evasion of payment. Nor do any of the cases cited by petitioner suggest such a requirement. Indeed, both the First and Fifth Circuits have recently held that the same conduct can constitute both an attempt to evade payment and an attempt to evade assessment. *United States* v. *Waldeck*, slip op. 15 (filing false W-4 forms "may be used as evidence of either evasion of assessment of tax or evasion of payment of tax or both"); *United States* v. *Masat*, 896 F.2d at 91 (assigning income and property to nominees and filing false W-4 forms "are acts constituting both evasion of payment and evasion of assessment").

Some of the affirmative acts alleged in this case constituted attempts to evade both assessment and payment. Those acts were: (1) "using checks made payable to petitioner and which constituted income, endorsing the checks and giving the checks to others

in payment for expenses, in order to conceal his income"; (2) "requesting and receiving rent payments in the form of silver dollars instead of Federal Reserve Notes, the silver dollars have [sic] a face value of $20 and having a market value of approximately $297"; and (3) "depositing and cashing checks at out-of-town banks." Pet. C.A. Br. App. B-2, B-6. All of those acts were designed to conceal income and thereby prevent an accurate determination of petitioner's tax liability. Such an evasion of assessment is, in turn, a means of ultimately evading the payment of the concealed tax liability. Thus, petitioner was not entitled to have acts identified as relating to one or the other of the two methods of evasion set forth in Section 7201.[9] Further review therefore is unwarranted.

4. Petitioner concedes (Pet. 39) that the fourth issue he raises is one "never addressed in any reported tax case: whether the government can sustain a conviction for attempted income tax evasion where the government has not calculated the tax due

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[9] *Bollenbach* v. *United States*, 326 U.S. 607 (1946), on which petitioner relies (Pet. 38-39), does not suggest a contrary conclusion. There, the defendant was convicted of conspiracy to commit an offense in violation of the National Stolen Property Act. The court of appeals affirmed the conviction, even though it found that the district court had given an erroneous instruction on the conspiracy charge, reasoning that the defendant could have been convicted as an accessory after the fact. This Court reversed, holding that the defendant had not been indicted or charged on the accessory theory and that, indeed, the statute criminalizing such conduct was not enacted until after the period covered by the indictment. By contrast, in this case petitioner was properly convicted of the crime with which he was charged: attempted evasion of tax.

and owing resulting from the affirmative act or acts constituting [*sic*] the attempt." See Pet. 39-43. Petitioner's novel theory is that because a willful failure to file a tax return or failure to pay taxes is not alone sufficient to constitute an attempt to evade tax, "any tax evaded or avoided as a result of said failures would not be a tax which [petitioner] 'attempted to evade.'" [10] Pet. 40-41. There is no merit to petitioner's position.

Although no court has squarely addressed the issue petitioner raises, *Spies* v. *United States* reveals the fatal flaw in petitioner's reasoning. There, the Court held that attempted evasion may consist of a combination of willful omissions and willful commissions (affirmative acts). The Court stated: "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." 317 U.S. at 499. The Court also stated, with respect to the defendant's acts in that case: "If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to evade or defeat the tax, we would consider conviction of a felony sustainable." 317 U.S. at 500. Thus, in an evasion case involving willful omissions along with affirmative acts, the omissions are part of the attempt to evade the tax.

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[10] Petitioner does not deny that he evaded at least some taxes by his affirmative acts. He contends (Pet. 43), however, that he was prejudiced by the government's method of calculation because the amount of tax he attempted to evade was higher than it otherwise would have been, and he therefore appeared more culpable to the jury.

Accordingly, the proper calculation of tax deficiency must include the tax due and owing as a result of the omissions as well as the tax due and owing as a result of the affirmative acts. Petitioner's argument to the contrary is baseless and does not warrant review by this Court.

5. Finally, petitioner contends (Pet. 44-50) that his Fourth Amendment rights were violated by the informant's retrieval of certain documents from the dumpster located in his office parking lot. The court of appeals thoroughly reviewed the factual findings made by the district court in support of its conclusion that petitioner had no legitimate expectation of privacy in the dumpster and did not find those findings to be clearly erroneous. Further review of this fact-bound claim is not warranted.

Petitioner asserts (Pet. 45) that "there is no reasonable basis to believe that the dumpster was generally open to the public," but the legal and factual premises for that assertion (Pet. 45-46) are incorrect. First, he argues that the dumpster was within the business curtilage and was not for public "consumption" or use. The district court, however, found that the dumpster was shared by other tenants, that it was not in an enclosed lot, and that it was accessible to the public. Gov't C.A. Br. 32. The court of appeals noted further support in the record for the finding of accessibility: the dumpster was located more than 55 feet from the nearest part of the office building; patients, employees, other building visitors and even strangers used the open 32-space parking lot; and anyone in the lot could walk up to the unlocked dumpster. Pet. App. 4a-6a.

Second, petitioner relies on the evidence that "no trespassing" signs were posted. As this Court has

noted, however, "it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. * * * [T]he law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests." *Oliver* v. *United States*, 466 U.S. 170, 183-184 n.15 (1984) (no legitimate expectation of privacy in open field despite the fact that intrusion constituted trespass at common law).

Third, petitioner points to the fact that the dumpster was placed on the property for the disposal of medical waste and toxic matter and that the property was partially fenced. Both courts below pointed out, however, that all tenants shared the dumpster. Presumably, the non-medical tenants deposited trash other than medical waste and toxic materials. Indeed, the documents petitioner sought to suppress were neither toxic nor medical waste. The district court, affirmed by the court of appeals, specifically noted the partial fencing but determined, in light of the other factors, that the dumpster was accessible to the public. Gov't C.A. Br. 14.

Petitioner has failed to demonstrate that any of the factual findings underlying the Fourth Amendment ruling by the courts below are unsupported by the record. This Court ordinarily has declined to disturb findings of fact in which two courts below have concurred. *United States* v. *Doe*, 465 U.S. 605, 614 (1984). Because the record in this case provides overwhelming support for the findings below, there is no reason for the Court to depart from that practice here. On these facts, the court of appeals correctly found that under *California* v. *Greenwood*, 486 U.S. 35 (1988), the abandoned contents of petition-

er's dumpster were not within the zone of privacy to which the Fourth Amendment applies. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *United States* v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984).[11]

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[11] Petitioner's effort to distinguish *Michaels* is unsuccessful. The two cases cited by petitioner (Pet. 47) both predate (but foreshadow) *Greenwood*. While holding that trash deposited in opaque taped containers had been abandoned, the Second Circuit suggested in *United States* v. *Terry*, 702 F.2d 299, cert. denied, 461 U.S. 931 (1983), that it would be possible to preclude inspection by shredding or burning documents before discarding them. Although the court also suggested that written restrictions on containers or their retention on private property might indicate an intent to retain a privacy interest in the contents, that was nothing more than a parenthetical example of circumstances that were not presented to the court and, therefore, pure dictum.

Petitioner's reliance on *United States* v. *Vahalik*, 606 F.2d 99 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980), is similarly misplaced. In that case, the defendant relied on an ordinance preventing unauthorized interference with garbage receptacles as evidence of his legitimate expectation of privacy in his trash. The Fifth Circuit rejected his argument because there was "no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance." 606 F.2d at 101. Petitioner also argues that a local ordinance prohibiting unauthorized interference with garbage receptacles gave him a legitimate expectation of privacy in his trash but, like the defendant in *Vahalik*, he does not point to any evidence in the record that he relied on that ordinance.

CONCLUSION

The petition for a writ of certiorari should be held with respect to the first question presented and then be disposed of as appropriate in light of this Court's disposition of *Cheek* v. *United States*, cert. granted, 110 S. Ct. 1108 (1990) (to be argued Oct. 3, 1990). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

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IN THE SUPREME COURT

OF THE UNITED STATES

JAMES C. DUNKEL, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	INDEX NO. 90-142 PETITIONER'S MOTION TO CONSOLIDATE

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COMES NOW JAMES C. DUNKEL (PETITIONER), pursuant to Rule 21(c) of the Supreme Court, and hereby moves this Court for an order consolidating the above captioned case with Cheek v. U.S., Index No. 89-658, cert. granted, 110 S.Ct. 1108 (1990).

I. GROUNDS FOR THE MOTION

A. Both cases raise an identical question in a criminal tax case where willfulness is an essential element of the crime: i.e., whether willfulness may be negated by a good faith misunderstanding of the law only if the asserted belief is objectively reasonable.

B. Both cases originate and involve an appeal from decisions out of the Seventh Circuit: see U.S. v. Cheek, 882 F.2d 1263, 1269 (7th Cir. 1989), cert. granted 110 S.Ct. 1108

(1990), Index No. 89-658; U.S. v. Dunkel, 900 F.2d 105 (7th Cir. 1990) (petition for writ of certiorari filed July 16, 1990, Index. No. 90-142).

C. Because of the identical issue raised by way of Cheek and PETITIONER, judicial economy and time will be conserved by consolidating the cases for argument.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. Overview

On May 25, 1990, PETITIONER'S Application for Stay of the Seventh Circuit's Mandate was granted by this Court. See PETITIONER'S Petition for Writ of Certiorari, Index No. 90-142, Appendix E incorporated herein by reference.

The GOVERNMENT did not oppose PETITIONER'S Application for Stay of Mandate because the Petition for Writ of Certiorari would present the identical question upon which this Court granted certiorari in Cheek: "whether in a prosecution for willful violation of the criminal tax laws, may the district court properly instruct the jury that a good faith misunderstanding of the law negates willfulness only if that misunderstanding was objectively reasonable?" See letter of May 24, 1990 from Solicitor General attached as EXHIBIT A. Therefore, judicial effort and other economies will be likely effected by consolidating the cases for argument.

B. Statement of Facts

1. This Court granted certiorari in the case of Cheek v. U.S., supra. Cheek raises the question: in a criminal tax case, may willfulness be negated by a good faith misunderstanding of the law only if the asserted belief is

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objectively reasonable.

2. PETITIONER'S Petition for Certiorari, supra, has raised the identical issue under almost identical facts.

3. The RESPONDENT in reply to PETITIONER'S Application for Stay of Mandate filed with this Court, did not oppose the application, because PETITIONER'S Petition for Writ of Certiorari would present the same question on which this Court granted certiorari in Cheek. See EXHIBIT A.

4. Because PETITIONER and Cheek both raise an identical issue now pending before this Court, the cases should be consolidated for reasons that this Court will conserve its time and effort.

WHEREFORE, for reasons previously discussed, PETITIONER prays that this Court grant his motion and consolidate the cases for briefing and argument.

DATED this 2nd day of August, 1990.

MacPHERSON & McCARVILLE, P.A.

By /s/
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CERTIFICATE OF SERVICE

JAMES C. DUNKEL, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

CASE NO. 90-142

The undersigned hereby certifies that a true and correct copy of PETITIONER'S Motion to Consolidate has been served on all parties required to be served by mailing, postage prepaid, in the United States Mail this 2 day of ~~July~~ August, 1990 to:

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U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 24, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

MAY 25 1990

Re: Dunkel v. United States, No. A-819

Dear Mr. Spaniol:

The government does not oppose the application for a stay of the mandate of the United States Court of Appeals for the Seventh Circuit in this case, pending the filing and disposition of a petition for a writ of certiorari. Petitioner asserts that he intends to file a petition for a writ of certiorari and that he intends to present the question on which the Court has granted certiorari in Cheek v. United States, 110 S. Ct. 1108 (1990): whether in a prosecution for willful violation of the criminal tax laws, the district court may properly instruct the jury that a good faith misunderstanding of the law negates willfulness only if that misunderstanding was objectively reasonable. Based on those representations, the government does not oppose the application for a stay of the mandate.

Sincerely,

Kenneth W. Starr
Solicitor General

cc: Donald W. MacPherson, Esquire
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Exhibit "A"